The Development of a Residential Qualification for Representatives in Colonial Legislatures

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BY

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TO ONE NOW GONE,
WITHOUT WHOSE INSPIRATION AND SACRIFICE
THE COMPLETION OF THIS WORK
WOULD NOT HAVE BEEN
POSSIBLE

FOREWORD

GEOGRAPHICALLY this study only covers the colonies which later became known as the Thirteen Original Colonies.

In point of time it extends from the period of first settlement down to the end of the colonial period. In most of the colonies the requirement that a representative must be a resident of the district he represents was incorporated into the Revolutionary constitutions. In those colonies where this was not done the study has been continued, but not in detail into the period of statehood.

At the very beginning some space has been given to a survey of English Constitutional history so far as it relates to the subject in hand.

This is justified by the close relationship, racial, social and institutional, which existed between the colonies and the mother country; a relationship so vital that we should expect to find every developing colonial institution to have a direct connection with some already well-developed English practice.

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The Development of a Residential Qualification for Representatives in Colonial Legislatures

GENERAL OBSERVATIONS AND COMPARISON WITH ENGLISH PRACTICE

In the United States to-day the invariable custom is that a representative must be a resident of the district he represents.

In the case of representatives and senators in the state legislatures this requirement is often by law but quite often by custom.

In the case of United States Representatives the only legal residence requirement is that they shall be residents of the states from which they are elected.[1]

A few states have passed laws requiring a United States Representative to be a resident of his district, but

. . . "the best legal authorities hold that a provision of this kind is invalid because state law has no power to narrow the qualifications for a Federal representative prescribed by the Constitution of the United States."[2]

Congress would probably so decide the question should it come before it, but the point has never arisen.[3]

So our present practice, though based upon custom, has fastened itself so strongly upon our political life that no candidate, no matter what his fame or abilities, could possibly be elected from a district in which he did not reside. The proof of this statement lies in the fact, that despite the eagerness with which men seek public office we never hear of a "receptive" candidate having the courage to attempt to stem the current of this traditional custom.[4]

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[1] U. S. Constitution, Art. I, Sec. 2.

[2] Bryce, I, 191.

[3] In several places I have found references to certain exceptions in practice, to this custom. If these were definite they would be both interesting and instructive, but so far I have been unable to verify them. Among these are the following:

(a) New England has had one or two examples of men representing districts in Congress in which they did not live.

(b) In New York and Chicago there have been cases of men representing Congressional districts which lie in a different part of the city than that in which they reside.

(c) A case of a Representative, who, soon after his election moved to another district but by force of public opinion was forced to resign.

[4] A story out of American political life of an attempt to disregard this rule of residence comes down to us on the authority of John Hay. When James A. Garfield was one of the

Now this practice seems to us Americans the only reasonable and practicable one, and one so necessary, if a representative is to be held responsible to his constituents, that we never give it a second thought. Only when we consider that our practice in this regard differs from that of all the leading nations of the world which have representative assemblies, are we brought to ask ourselves How? and Why? is our practice so different.

In the Reichstag of Germany, in the Chamber of Deputies of France, in the English House of Commons, and even in both the House of Commons and Senate of Canada a local district is allowed to go anywhere in the realm for its representative and often does so.

With France and Germany we are not so closely concerned. But why in this one political custom we differ so from the mother country, or coming closer home, why this difference between us and our neighbor on the north, both recipients of a common political heritage and on the same continent where propinquity might be supposed to bring common political practices? These questions seem interesting enough to demand an answer.

"One of the phenomena that attracts the attention of the student of colonial institutions is the way in which the settlers repeated certain arrangements of the mother country and did not reproduce others. They modelled their criminal code on that of England, they based their local government on that of the home land, but they built up their representative systems entirely anew." [5]

While this gives us a good idea of some of the contrasts in colonial political action yet it is not quite accurate. Another American political writer sums up the matter admirably. "Early in the history of the colonies variations in English methods began which eventually came to be regarded as

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leaders of the House of Representatives it became doubtful if his district would return him at the approaching election because of the strength of the opposite party. So Mr. Hay went into an adjoining district to sound the voters there as to the propriety of running Mr. Garfield from their district. Although it is probable that there was no local man of Garfield's ability in that district yet everywhere Hay met with the reply,

. . . "Why, he does not live in our district."

Bryce, I, 194, Note.

[5] Channing, History of U. S., III, 74.

American characteristics; but Americanisms in politics, like Americanisms in speech, are apt to be Anglicanisms which died out in England but survived in the New World." [6]

All writers on English Constitutional History agree that the original English practice was for a member of the House of Commons to be a resident of the county or borough which returned him. Stubbs calls this a requirement of the Common Law. That it was the case can be seen from the words "de comitatu tuo" in the writs of election addressed to the sheriffs of the counties.

The first English statute restricting the counties to the return of a resident as a member of the House of Commons was 1 Henry V,[7] and is perhaps a sign that some deviation from the original practice had already sprung up. This law was followed by several others on the main subject of Elections, the principal one of which was that 8 Henry VI,[8] by which both electors and elected were to be actually resident in the county.[9]

It seems to be a point of uncertainty with all writers on the English Constitution as to just when these laws began to be evaded. Some think as early as the following reign, that of Edward IV.[10] Uncertain as this is we are sure that by the time of Elizabeth[11] they were quite generally disobeyed, for in 1571 we find a bill introduced in the House of Commons, the intent of which was to repeal as to the boroughs the statute of Henry V and to legalize the innovation which had sprung up.

The bill appears to have been dropped, but the debate on it which occurred on April 19th has been preserved for us in D'Ewes' Journal.[12] The supporters of the bill advanced the argument that a man could not be presumed to be wiser for being a resident burgess, and also that the whole body of the realm and its service was more important and more to be respected than any private regard of place or person.

[6] Lord, Rise and Growth of American Politics, I, 5.
[7] (1413–1422.)
[8] (1422–1461.)
[9] Taswell Langmead, 314.
[10] (1461–1483.)
[11] (1558–1603.)
[12] D'Ewes' Journal, 168–171.

"This," says Hallam,[13] "is a remarkable, and perhaps the earliest assertion, of an important constitutional principle, that each member of the House of Commons is deputed to serve not only his constituents but for the whole kingdom; a principle which marks the distinction between a modern English Parliament and such deputation of the estates as were assembled in several continental kingdoms; a principle to which the House of Commons is indebted for its weight and dignity, as well as its beneficial efficiency, and which none but the servile worshippers of the populace are even found to gainsay."[14]

Those who took the other side of the question argued that the rights and privileges of the "common man" ought to have more consideration, but their main argument was the interference of noblemen in elections in favor of non-resident nominees.[15]

The longest speech recorded in the debate was made by some unnamed orator in opposition to the bill. The argument which he advanced in the following quotation is without doubt the one that would be most commonly used by those who believed in the residential qualification. He said: "We who have never seen Berwick or St. Michael's Mount can but blindly guess of them, albeit we look on the Maps that came from thence, or see Letters of Instruction sent; some one whom Observation, Experience, and due Consideration of that Country hath taught, can more perfectly open what shall in question thereof grow, and more effectually reason thereupon, than the skillfullest otherwise whatsoever."[16]

Bishop Stubbs says that it was due to the political jealousies of the Tudor times that strangers began to covet and canvass for borough membership and began to encourage the towns to violate the provisions of the act of Henry V. This statute was often evaded by the admission of candidates to free burgership.[17]

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[13] Hallam, I, 266.

[14] If this view of representation existed in the United States the representatives in Congress would be elected by each state at large—a practice which is only followed when an election comes so soon after a reapportionment of representatives that the state cannot be districted.

[15] Taswell Langmead, 314–315.

[16] D'Ewes' Journal, 169.

[17] The boroughs were much greater offenders in violating the resident act than were the counties. Representation of counties by non-residents did not develop till after the custom was well established in the boroughs.

We find that at Lynn in 1603, Robert Hitcham, Esquire, who had been elected was required to come and be made a free burgess of the town. And in 1613 Hitcham and Sir Henry Spelman, both non-residents, sought election as representatives of the town. The corporation replied that they intended to obey the statute of Henry V and elected two citizens.[18] There was another example of this practice which perhaps changed or at least affected the course of English history. In 1640 Cromwell was living at Ely but was desirous of entering the House of Commons as a representative from Cambridge. The only difficulty in the way of this project was that he was not a freeman of that borough. This difficulty was surmounted by the Mayor of Cambridge making him a freeman 'gratis' on the payment of one penny into the poor fund. These preliminaries having been arranged he was duly elected a member of the first Parliament of 1640, on March 25 of that year.[19]

The laws of 1413, 1429, 1432, and 1444-45 were repealed in 1774. Parliament in that year declared that the above Acts

"have been found by long usages to be unnecessary and have become obsolete"

. . . and so in order to

. . . "obviate all doubt that may arise upon the same"

the statute books were cleared of all enactments relating "to the residence of persons to be elected to serve in Parliament or of the persons by whom they are to be chosen." [20]

By the words of the above act it will be seen that voting by non-resident electors was also legalized. This custom had grown up simultaneously with that of electing non-resident representatives. It was almost a necessary adjunct of the latter for many times a candidate had to bring a large number of supporters with him on election day if he hoped to carry the election.

The question that now presents itself for consideration is

[18] Stubbs, III, 439.
[19] Porritt, I, 61: Sandford, Studies and Illustrations of the Great Rebellion.
[20] Porritt, I, 122: 14 George III, C. 58.

why should such a custom as this one we have been studying, grow up in the face of law after law on the subject? The answer can be given perhaps in the following three reasons:

(a) In an early day it was considered a hardship not an honor to serve in Parliament. So this office became open to professional candidates.[21]

(b) To the practice of borough mongering by which some candidate unconnected with the place was sent down as a representative by some influential person of the borough. This grew up as a result of the great social changes in England during the seventeenth century at which time there was a great shift of population, causing large cities to spring up in northwestern England and leaving once populous boroughs practically uninhabited.

(c) The direct purchase of the seat from the corrupt corporation or from the limited body of freemen.[22]

Even down to 1885 it was quite generally recognized that a candidate for Parliament should either be a resident of the county or at least own property there; in fact, a freehold qualification existed until 1858. But to-day it is a well recognized fact in England that a man may offer himself for election in any borough or county regardless of his place of residence.[23]

We have noted three reasons for the beginning and growth of the practice of non-resident representation. But when these reasons have all disappeared by reason of improved social conditions and the Reform Bill of 1832, we find no change in the practice. In fact such a custom is practically necessary under the Cabinet system of England;

[21] An illustration of the indifference of the boroughs to representation is shown by the incident of Torrington in Devonshire, which even obtained a charter exempting it from sending burgesses to Parliament—Hallam, Middle Ages, III, 115.

In an early day the boroughs had to resort to an official called manucaptor whose duty is was to see that the elected representative rendered service. Porritt, I, 5–6.

[22] The abuses in the above were remedied by the Reform Bill of 1832, although it did not affect the resident feature.

[23] A few years ago a man who was a candidate for Parliament naively told Mr. Bryce that he thought a candidate should at least live near enough to the county in which he was a candidate that he could look into it from his window while shaving in the morning. This particular man's view was probably influenced by the fact that his house lay just outside the county in which he was a candidate.

for the ministers are necessarily members of the House of Commons. Oftimes a man who has attained great eminence in some particular field of government is defeated for re-election in his home district because of some temporary local dissatisfaction.[24] But the English view, which differs so much from that of the United States, is that no local opposition must be allowed to rob the country as a whole of the services of a very eminent man, therefore, he can stand for election in any district of the kingdom.

It is interesting, and not altogether idle, to speculate on which of these two systems, the English or that of the United States, flowing from a common source, is the most natural development for a free country. No less an authority than Mr. Bryce gives as his opinion that the English practice seems to be an exception due to special causes, while the practice in the United States is that which one would naturally expect to find in a free country where local self-government is fully developed. And yet, after all, he feels that it would make for better government if we should follow the English plan. "That the restriction often rests on custom, not on law, makes the case more serious. A law can be repealed, but custom has to be unlearned; the one may be done in a moment of happy impulse, the other needs the teaching of long experience applied to receptive minds."

"The fact is that the Americans have ignored in all their legislative, as in many of their administrative arrangements, the differences of capacity between man and man. They underrate the difficulties of government and overrate the capacities of the man of common sense. Great are the blessings of equality; but what follies are committed in its name." [25]

[24] Of the last five prime ministers who have sat in the House of Commons not a one has represented his place of residence. Bryce, I, 183. David Lloyd George represented his home constituency when made prime minister.

[25] Bryce, I, 487.

MASSACHUSETTS

In order properly to understand the system of representative government which existed in Massachusetts it will be well to review briefly the origin and constitution of the general court, for by that name has the legislature of Massachusetts been known from colonial times down to the present. The Company of Massachusetts Bay was a corporation, the governing body of which was the general court. Its officers were a governor, deputy governor and eighteen assistants, all to be chosen out of the freemen of the company[1] and by the freemen of the company in annual election. The composition of the court is shown by the following:

"And that any seven or more persons of the Assistants, together with the Governor or Deputie Governor, soe assembled, shalbe saide, taken, helde and reputed to be, and shalbe, a full and sufficient Courte or Assemblie . . . for the handling, ordering and dispatching of all business . . . ." [2]

In March, 1629, the company received a royal charter,[3] confirming the territorial grant which it had received from the New England Council the March previous.[4] By this charter full governmental and corporate rights were bestowed upon the company. The charter provided for four annual sessions of the general court; the last Wednesday in Hilary, Easter, Trinity, and Michaelmas.[5] The general court was to have the power of making laws and the only check imposed upon it was that they were not to be repugnant to the statutes of England.[6]

For a year after the charter was granted to the company it remained in England. During this time the general court met at various times but the business transacted was only such business as any company interested in a colonization scheme would need to perform. But when in March, 1630, the company with its charter removed to America, by the mere

[1] Mass. Col. Records, I, 10.
[2] *Ibid.*, I, 11.
[3] *Ibid.*, I, 6–8.
[4] *Ibid.*, I, 4.
[5] *Ibid.*, I, 11.
[6] *Ibid.*, I, 12.

act of removal the corporation became a colony and the general court became the law-making body of that colony. We might also say that under the new conditions the term "freeman" is synonomous with "stockholder" of the company as first organized. The corporation was not a closed one, so the number of the members constituting it could be indefinitely enlarged. The power to admit freemen was in the general court.[7]

Not all who came with Winthrop and his associates were freemen in the sense of being members of the corporation. Besides there were inhabitants already on the ground. In 1630 the officials of the company, that is, governor and magistrates, were practically all the members of the corporation residing in Massachusetts.[8] But at the first general court held at Boston, October 19, 1630, a large number of persons, some of them old planters, petitioned for admission as freemen.[9] These not only were not admitted but the officials of the colony drew themselves into a still more compact oligarchy in direct violation of charter. The court declared that assistants should be chosen by the freemen but that the governor should be elected by the assistants and from among their own number, also that the governor and assistants should have the power to make and execute laws, and levy taxes.[10] It was as a result of the protest against this assumption of extra-charter powers that the system of deputy representation came into existence four years later.[11] Another important factor in this was the rapid extension of settlements which made it very laborious, if not impossible, for the freemen to attend the general court in person and also the great increase in the number of freemen.

The years between 1630 and 1634 were years of rapid development of the general court into a representative assembly. At the general court which met on May 18, 1631, a most important act was passed acknowledging the violation

[7] Mass. Col. Records, I, 11. [8] Palfrey, I, 323.

[9] The student of colonial history will understand that this term "freemen" is not used in contradistinction to the word slave or servant. By it is meant a man with full political rights and privileges.

[10] Mass. Col. Recs., I, 79. [11] Osgood, I, 156.

of the charter in the act of the October previous, and providing that

". . . once every year, att least, a generall courte shalbe holden, att which Court it shalbe lawfull for the commons to ppound any pson or psons whome they shall desire to be chosen Assistants, etc." [12]

The act goes on to state that a majority of the "commons" shall so elect and also that if they shall see cause they can remove one or more of the assistants.[13] The last sentence of this act contains the famous requirement of citizenship peculiar to the New England Colonies.[14] Now that they had a test by which prospective citizens could be measured, a large number of those who applied at the October session of 1630 were admitted as freemen. And at nearly every session of the court after that additions were made to the body of freemen. The next year saw still more power put into the hands of the freemen. At the general court which met on May 9, 1632, the right of election of governor and deputy governor was restored to the freemen assembled in general court. Massachusetts was now a pure democracy, where each freeman had a place in the law-making body of the state.

It is evident that even by this time the population had spread into the surrounding country, for we find several towns[15] mentioned which were to appoint two citizens each to confer with the court about raising a public stock. It seems not at all unnatural that a demand for representation should come just as soon as the expansion mentioned above reached the point where each freeman himself could not attend the general court. This demand came in 1634, hastened perhaps by the fact that a tax had been levied by the assistants the year before. Shortly before the session of the May court of

[12] Mass. Col. Recs., I, 87.

[13] An early example of recall.

[14] "To the end of the body of the commons may be preserved of honest and good men, it was likewise ordered and agreed that for time to come no man shall be admitted to the freedome of this body politicke but such as are members of some of the churches within the lymitts of the same."

Mass. Col. Records, I, 87.

[15] The settlements by the year 1632 were Boston, Salem, Watertown, Roxbury, Saugus(Lynn), Newe Town (Cambridge), Charlestown, and Dorchester, Mass. Col. Records, I, 95.

1634, representatives from the towns waited upon Governor Winthrop. They asked to see the patent and urged the establishment of a system of representation.[16]

While the governor did not view this request favorably, the general court of 1634 acted upon it. An act was passed providing that before every general court the freemen of each plantation were to choose two or three deputies.[17] These were to have a part in the making of laws, granting of lands, and all public business. The election however of governor and assistants was still to be left to the body of freemen assembled in annual Court of Election.[18] But the statement that the towns could send two or three deputies did not mean that it was left to their pleasure. In the Act a specific list of towns (to the number of 7) was given with the apportionment for each. For several years this continued to be the method. When a town was admitted to the privilege of representation the act by which it was so admitted always mentioned the number of deputies it could choose.

From the year 1629 to 1635 we have traced the development of the general court from the governing body of a trading corporation, through its attempt to become an oligarchial governing body down to its expansion as the representative legislative body of a commonwealth. It had not yet reached its final form. Two more changes were necessary, but these both came within the next nine years. In 1636 the legislative equality of the two branches was acknowledged[19] and in 1644 the two branches ceased to sit together as one house.[20]

"Thus within a period of fourteen years from the transfer of the government the Massachusetts legislature had assumed its final form. It always bore, however, not only in name, but in character, the marks of its origin. As in the corporation, so in the colony, the general court was the source of power." [21]

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[16] Winthrop, I, 152, 153.

[17] For several years this is the word used instead of representatives.

[18] Mass. Col. Records, I, 118–119. [18] *Ibid.*, I, 170.

[19] After this separation the governor presided over the Assistants while the Deputies elected a Speaker annually.

[21] Osgood, I, 158.

The court as it now stood was a wholly elective body. The governor and assistants being chosen by the freemen collectively, while the deputies were elected by a constituency in a local district, that is, by towns.[22]

At different times we find the general court passing requirements[23] to which the towns had to conform in their choice of deputies, but nearly sixty years passed before the question is raised regarding residence and then not until the first charter had been taken away and a new one substituted for it. The only reference to residence in any act under the old charter is found in a proposal of the general court in 1644. In an effort to decrease the growing expense of the court, due to the greater number of deputies seated each year, the November court proposed a measure to reduce the number of deputies to twenty and to make the shires the unit of representation.[24]

Two provisions of this proposal show that the English idea of representation was the prevailing one. "And further to y^{e} end y^{e} ablest gifted men may be made use of in so weighty a work, it shall be at y^{e} liberty of y^{e} freemen to choose them, in their own shires, or elsewhere, as they shall see best."

In order to avoid the possibility of two shires choosing the same man the election was to be held on different days in various shires; Suffolk voting first and sending the result to Middlesex which was to vote on the next fourth day, sending the result of her election and Suffolk's to Essex and Norfolk which were combined into one under this proposed scheme of representation. Evidently no action was taken upon this proposition, for we see nothing further about it in the records. About a year later the general court sought to bring

[22] Not the town as now generally understood but the New England town.

[23] In 1635 the general court ordered all elections of deputies to be by ballot. From this date all colonial elections were of this kind. Before this they had followed the English plan of a "show of hands". It is fortunate for American political life that we early broke away from a custom which had been productive of so much evil in the mother country. Under the English procedure an unscrupulous official could bring about the election of nearly any candidate he favored. When the day of election came the crowd assembled, nominating speeches were made; each candidate made a speech and then the sheriff called for a *viva voce* vote. The side able to respond with the greatest uproar, either aye or no, could thus carry the day. If the vote was taken by a "show of hands" the sheriff decided the election by "taking a view" of the number. The ballot was not used in Parliamentary elections until 1872. (Stubbs, III, 417, 419–420.)

[24] Mass. Col. Recs., II, 88–89.

about the same economy by providing that it should meet at each of the three shire towns in order that each town sending deputies should bear their expense.[25]

It was not until the separation of the two houses of the general court in 1644[26] that the names of deputies, together with the names of towns from whence they came, appear in the records.[27] So before this date it is impossible to tell whether there were any cases of non-resident representation. But from this date on there was much of it, especially in the case of the more distant towns such as those in the Piscataqua region[28] and the ones in the Connecticut valley. It is impossible to gather all the cases illustrating this, for quite often in the records of the House of Deputies the names of the towns from which the deputies came are omitted. But those that can be given show the practice clearly enough.

In 1670 all the following men were officials of Boston: Captain Thomas Clarke, Mr. Humphrey Davy, Lieutenant Richard Cooke, and Captain Edwin Hutchinson, Commissioners; Captain Thomas Savage, moderator; and John Richards and Captain William Davis, selectmen.[29] If one were to make a list of colonial men who could be called "professional representatives", the above group would be such a list; for each one represented time and again some

[25] Mass. Col. Recs., II, 140—The custom regarding pay fluctuated back and forth between the towns and the colony at large. The March Court of 1635 made provisions for the 'dyett' of the deputies while in actual attendance. Such expense was to be borne by the colony treasury. (Col. Recs., I, 142.) In September, 1636, it was provided that

". . . the deputies debt shall be paid him in money or beaver."

(Col. Recs., I, 180.) Who was to pay him is not stated. But a change of sentiment seems to have come for in October of the same year the following was passed:

. . . "That the charge of the deputies of the town be borne by the towns which they came from, to ease the publicke".

Col. Recs., I, 183. On March 9, 1637 the deputies were restored to the payroll of the colony but there was no mention as to the amount to be given them. (Col. Recs., I, 187.) In May, 1638, another change was made again throwing the deputies onto their towns for payment. The rate was to be two shillings and six pence per day

. . . "from the time of their going out—untill their return for their dyot and lodging."

[26] Mass. Col. Recs., II, 58.

[27] By this time it had been enacted that no town send more than two deputies. (Col. Recs., I, 254.)

[28] Massachusetts had assumed control over this territory by 1641. In that year it was given the privilege of sending

. . . "two deputies from the whole ryver."

(Col. Recs., I, 343.) On September 27, 1642, it was granted the privilege of sending one from each town and in addition the court waived in their favor the qualification of church membership. (Col. Recs., II, 29.)

[29] Boston Town Records (1660–1701), pp. 52, 56.

outlying town, and most of them were also Boston officials at the time. Taking them in the order in which they have been given, we will examine the record of each.

Thomas Clarke represented Newberry in the general court of 1671 and 1672.[30] In the same court he was one of Boston's deputies and had been for ten years. This presents an anomalous situation. Careful search has been made to see if it were possible that two men of the same name[31] were deputies that year but such was not the case. Search was also made to find any similar case but only one was found, which will be given later, except in the case of two neighboring towns far distant from the seat of the general court. From another source we learn that Edward Woodman and William Titcomb, two residents, had been chosen deputies by Newberry on March 6, 1671. But they must have declined to serve, for shortly afterwards Richards and Clarke, both Boston men, were chosen for the remainder of the year.[32]

Humphrey Davy represented Billerica, in the general courts of 1666-67 and 69;[33] and was Woodburn's representative for the years 1671 to 1678 inclusive.[34]

Lieutenant Richard Cooke represented Dover in 1670 and 1671 along with Richard Waldern, a resident.[35]

Captain Edwin[36] Hutchinson was a Boston deputy in the general court of 1658.[37] In the court of election of the year 1670 and 1671 we find him acting as deputy for Kittery. Still later in the years 1672 and 1673 he represented Woodburn.[38]

Captain Thomas Savage was one of Boston's representatives in the general court of 1661 and 1662. In 1663 he repre-

[30] Mass. Col. Recs., Vol. IV (2), 485, 507.

[31] A Captain Thomas Marshall represented Boston in 1650, Col. Recs. IV (2), 1. Also a Captain Thomas Marshall was Lynn's representative for the years 1659-60-64-68. These were different men, the latter returning to England during the Civil War and becoming a captain in the Commonwealth Army. (Mass. Col. Recs., IV (1), 364, 382, 416.) Lewis, History of Lynn, 91, 106, 146, 148.

[32] Currier, History of Newberry, 678.

[33] Mass. Col. Recs., IV (2), 295, 331, 418.

[34] *Ibid.*, IV (2), 485, 507, 551; V. 2.

[35] *Ibid.*, IV (2), 449, 485.

[36] Appears some places as Edward.

[37] Mass. Col. Recs., IV (1), 320.

[38] *Ibid.*, V, 449, 485, 507, 551.

sented Hingham, and in 1672 was deputy for Andover. The first year he served for Andover he was elected speaker of the House of Deputies.[39]

John Richards represented Newberry in the years 1671-72-73. In 1675 he appears as a deputy for Hadley.[40]

Captain William Davis, the last man on the list, was Springfield's deputy in 1652, 1666, 1671, 1672, and 1776. During one of the intervals of time when he was not serving for Springfield, he appears as a deputy for Haverhill in the general court of 1668.[41]

There were two other residents of Boston who can as justly be called "professional representatives" as any of the men in the list given above. These are Captain William Tynge and Captain John Hull.

Tynge represented Boston in 1644 and was at the same time treasurer of the colony. He was also Boston's representative in the October court of 1646 and again in 1647.[42] In 1650 he appears as deputy for Dover[43] and in 1649 and 1651 for Braintree.[44]

Hull was one of the mint masters of the colony and though a resident of Boston he was the first deputy to sit in the general court for Westfield. Westfield was made a town in 1669 and was represented by Hull in the years 1671 to 1674 inclusive. In the court of 1676 he represented Concord and in February court of 1680 was deputy for Salisbury.[45]

But non-resident representatives were not confined to Boston, as the large number of cases given above might indicate. This will be seen from what follows.

As has already been stated, the first record that appears of deputies, together with the towns they represented, is in 1644 when the two houses began to sit apart. In the general

[39] Mass. Col. Recs., IV (2), 1, 41, 71, 485, 507.

[40] *Ibid.*, IV (2), 485, 507, 551, 560; V. 42.

[41] *Ibid.*, III, 259; IV (2), 294, 362, 485, 507.

[42] *Ibid.*, III, 10, 79, 105.

[43] There is a descrepancy in the records here. The General Court Records have him enrolled as deputy for Dover (Col. Recs., IV (2), 2.), while the Deputies Record have him as representing Braintree. (Col. Recs., III, 183.)

[44] Mass. Col. Recs., III, 147, 220; IV (1), 37.

[45] *Ibid.*, IV (2), 432, 485, 507, 551; V. 2, 98, 260.

court which met on May 29, of that year, we find the names of Richard Dummer and Nathaniel Sparrawhawk as deputies from Salisbury and Cambridge respectively. But at the general court a year later the same men represent Newberry and Wenham respectively.[46] In May, 1646, the records show that Dummer and Sparrawhawk were again deputies from their own towns, as two years previous while Wenham is represented by Lieutenant Duncomb, a citizen of Dorchester, auditor general of the colony, and a representative of his home town in the general court of the year previous.[47]

Wenham's choice of a deputy first from Cambridge then from Dorchester shows the tendency which was plainly marked in the early days of the colony, at least, for the remote towns to choose a representative either from Boston or some town near Boston. Its choice of the auditor general illustrated another tendency which can be quite plainly traced through the records. That was for the outlying towns to choose some man of prominence; some colonial official, if they could find one who was not already a deputy.

In the general court of 1645 Gloucester was represented by Hugh Prichard, a resident of Roxbury and a deputy from there in the court of the previous year.[48]

Springfield first had a representative in the House of Deputies in 1649. This was John Johnson, a resident of Roxbury,[49] and surveyor general of the colony.[50] He had been a deputy from his home town in the years 1644 to 1648, and was again in the year 1650.[51] This was a beginning of a large number of non-resident deputies which Springfield elected to the general court. Its second representative was Edward Holyoke, of Lynn, who served for Springfield in 1650 and 1660.[52] He had represented Lynn almost continuously from 1639 to 1648. Then as has already been stated it was represented for five years by William Davis of Boston. In 1653 it was represented by Captain Humphrey Atherton,

[46] Mass. Col. Recs., III, 1, 10.
[47] *Ibid.*, III, 54, 62.
[48] *Ibid.*, III, 1, 10.
[49] *Ibid.*, III, 147, 304.
[50] Another illustration of the tendency mentioned in the case of Wenham.
[51] Mass. Col. Recs., III, 183.
[52] *Ibid.*, IV (1), 416.

a resident of Dorchester, and a representative from his home town continuously from 1644 to 1651. At this time 1653, he was major of the militia, surveyor general, and speaker of the House of Deputies.[53] When the contest over non-resident representatives came with Governor Phipps in 1693, Springfield was one of the towns involved, for it was represented at the time by Benjamin Davis of Boston.[54]

Dover after being granted representation in 1642 was generally represented by a resident, but we have already seen that it was for a time represented by two Boston men, Tynge and Cooke, and Lieutenant John Baker of Ipswich was its deputy in the year 1650.[55]

Kittery and York were represented for the first time in 1653. In the court of that year, as well as for three succeeding years, Kittery was represented by John Wincoll, a resident of Watertown and a deputy from his own town in 1658.[56] We have already mentioned Kittery's representation by Edward Hutchinson of Boston. In 1679[57] it was represented by Major Richard Waldron of Dover, a prominent resident of the Piscataqua country and a deputy for years from his own town. York generally sent a resident as its deputy to the general court. It was represented for years[58] by one of these, Edward Rushworth. But in the December court of 1660 we find it represented by Francis Littlefield, a resident of Wells.[59]

[53] Mass. Col. Recs., III, 10, 68, 121, 183, 297, 401. This duplication of offices in the hands of one man was a fact quite common in colonial times.

[54] A perusal of the list of Springfield's representatives for the first forty years shows that for that length of time at least its representation was in the control of the leading family, the Pynchons. From the date of her first deputy (1650) to the time of the contest with Phipps (1693) Springfield had been represented in twenty-eight general courts. In twenty of these the deputy was John Pynchon himself or some kinsman either by blood or marriage. Davis, the Boston man to whom Phipps objected, was a grandson. Whether such a paternalism existed in any other town is doubtful. Burt, I, 34-38.

[55] Mass. Col. Recs., III, 183. There is some uncertainity as to the residence of Baker. Two John Bakers appear in the Records, one of Wells and one of Ipswich. See Mass. Col. Recs., III, 445.

[56] *Ibid.*, III, 297, 340, 373, 384; IV (1), 120, 182, 222, 320, 372.

[57] *Ibid.*, V. 211.

[58] *Ibid.*, IV (1), 120, 182, 222, 255, 321, 417.

[59] *Ibid.*, IV (1), 158, 449. The May Court was the most important one and the one most largely attended. If a town were represented in but one session of the court during the year this was the one where we would find its deputy. But in the December Court of 1660 we find a much larger attendance than at the Court of Election in May. Towns which were not represented in the latter now had a deputy present and quite a number which only had one deputy in the former now had two. This would be evidence enough to show that some business of unusual importance was in hand and turning to the proceedings we see that news of the Restoration had arrived and with it fear as to its result

Now in the May Court of Elections Rushworth had been its deputy. This shows us that deputies were not always chosen for the whole year, although that was generally done.

Portsmouth, like York, generally elected a resident but in 1654, Valentine Hill of Dover was its deputy, and in 1672 Richard Collicott of Boston;[60] Hill represented his home town in several sessions.[61]

In 1658 Massachusetts extended its bounds still further northeast and organized the territory around Casco Bay into the two towns Scarborough and Falmouth. They were given the privilege of sending one deputy jointly, to the general court and two in special cases.[62] In the next court we find them represented by Edward Rushworth of York.[63] At several courts they were jointly represented by a citizen of one town or the other. But in 1673 and 1674 Scarborough was represented by Peter Brackett of Braintree. Brackett had been a deputy for his own town almost continuously from 1653 to 1662.[64] Falmouth's only non-resident was Richard Collicott of Boston, who appeared for it in 1669. In 1672 Collicott represented both Portsmouth and Saco.[65] This is the second instance noted where one man appears as deputy for two towns at the same time.[66]

Even before the Casco Bay territory came under the control of Massachusetts, the latter extended its jurisdiction over Wells and Saco by a body of commissioners in July, 1653, and the towns were first represented in the general court of the next year. They did not send deputies regularly but when they did they were usually residents. Saco's representation by a Boston man has been noted above.

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on the continuation of the government in Massachusetts under the charter. The entire proceedings of this session were confined to a long petition to the king; one to Parliament; and a letter to the agents of the colony, Captain John Leverett, Richard Saltonstall and Sir Henry Ashurst. (Mass. Col. Recs., IV (1), 449-456.)

[60] Mass. Col. Recs., III, 340; IV (2), 507.

[61] *Ibid.*, III, 259, 297, 373, 422. Until the year 1653 Portsmough appears in the records as Strawberry Bank. In above year its name was changed and it was granted the privilege of sending a deputy to the general court.

[62] *Ibid.*, IV (1), 360.

[63] *Ibid.*, IV (1), 365. See page 27.

[64] *Ibid.*, IV (2), 2, 41, 120, 255, 321, 416, 551, 561; V, 2.

[65] *Ibid.*, IV (2), 418, 507.

[66] See page 24.

Newberry quite often availed itself of the opportunity of sending a non-resident deputy to the general court. In 1654 it was represented by John Saunders of Wells.[67]

Billerica, as has already been noted, was represented for three years by Humphrey Davy of Boston. Later in August of 1676, and in the February court of 1680, its deputy was Job Lane of Malden.[68]

Beverly presents but one case of non-residence representation and then their representative was taken from their neighbor, Salem. Beverly had been made a town in 1668, but its first deputy appears in the general court of 1672. In that and the following years its deputy was Captain Thomas Lathrop, who had previously been a deputy for his own town of Salem.[69]

Salem also presents but one case of non-residence representation; that was in 1677 when it had for a deputy Thomas Graves of Charlestown. Graves had already had experience as deputy for his own town.[70]

Chelmsford is another town which has but one instance of representation by a non-resident, down to the time of the contest with Phipps. At that time we find it to be one of the towns which aroused the Governor's ire by returning a non-resident. Previous to this, in 1667, it was represented by Peter Tilton of Hadley who had already had experience as a deputy for his own town and was returned for several years thereafter.[71]

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[67] Mass. Col. Recs., III, 333, 336. Saunders had formerly lived in Newberry (Col. Recs., III, 165). Several cases of removal occur in the early years of the colony which might be taken for non-resident representation. For example, Brian Pendleton appears as a deputy for Watertown in 1648, and for Strawberry Bank in 1652. After the name of Strawberry Bank was changed to Portsmouth his name appears often both as deputy and in other connections. He had evidently moved to the Piscataqua territory some time between 1648 and 1653. (Mass. Col. Recs., III, 277).

The name of Joseph Hills appears in the records as a deputy from Cambridge, Malden and Newberry, but in none of these cases did he represent one town while living in another. He was a resident of Cambridge and while so represented his town in the years 1646 and 1647. When Malden was set off from Cambridge as a separate town his residence was within the new village. He was a deputy for Malden for the years 1649-1656. In 1665 he moved to Newberry and acted as a deputy for that place in 1667 and 1669. (Mass. Col. Recs., IV (2), 2, 41, 72, 100, 330, 417.) Corey's History of Malden, 181-182.

[68] Mass. Col. Recs., V, 99, 261, 476, Corey, History of Malden, 204.

[69] *Ibid.*, IV (2), 100, 407, 507, 551.

[70] *Ibid.*, V, 77, 98, 132, 184.

[71] *Ibid.*, IV (2), 142, 295, 330, 362, 449, 485, 507, 551; Judd's History of Hadley, 585.

Hadley was given representation in the general court in 1661, and from that time until 1672 it was quite regularly represented by residents. In the above year and again in 1673 and 1683 its deputy was Henry Phillips of Boston, while in 1675 it was represented by John Richards, also of Boston.[72] In 1673, during the May Court, which as the annual court of elections was considered most important, Hadley was represented by the two residents, Peter Tilton and Samuel Smith, but in the fall court Smith was replaced by Phillips, a Boston resident. It had also been represented in 1669 by William Halton of Northampton,[73] who was also a deputy for his own town from 1664 to 1671 with but few intermissions.[74] It was during one of these years that he was deputy for Hadley.

No deputies sat in the general court for Northampton until 1664. In the May court of that year we find Samuel Smith and William Lewis,[75] both residents of Hadley and who had represented Hadley previous to this time and did again subsequently to it.[76] In August court of 1676 Northampton was represented by Henry Phillips of Boston.[77]

A retrospective glance at the instances which have been given will show at once that it was the distant towns which availed themselves of the privilege of electing non-residents to represent them in the general court. But the word "distant" meant something different then from what it does now. It is said that it took people in Springfield three days of arduous riding to reach the capital. Such towns as Boston, Charlestown, Dorchester, Roxbury, Watertown, Lynn, and Cambridge were always represented from among their own citizenship. An inspection will also show, I think, that as the seventeenth century progressed the towns availed themselves less and less of this privilege. While the law and custom permitted non-resident representation, yet the towns preferred to return their own citizens as deputies except when distance, weather, expense or some other consideration intervened.

[72] Mass. Col. Recs., IV (2), 113, 507, 561; V, 42, 421.
[73] *Ibid.*, IV (2), 418.
[74] *Ibid.*, IV (2), 117, 142, 295, 331, 449, 485.
[75] *Ibid.*, IV (2), 100.
[76] *Ibid.*, IV (2), 2, 41, 72, 117.
[77] *Ibid.*, V, 99.

So far we have shown the practice of the colonists but have said nothing of the law which was supposed to govern the practice. With them the case was different from that in England. In England during this same period non-resident representation was practiced but was contrary to law. But such was not the case in Massachusetts, as the following quotations from the Body of Liberties of 1641, a compilation of colonial law, bear witness:

"Any Shire or Towne shall have libertie to choose their Deputies whom and where they please for the General Court. So be it they be free men, and have taken the oath of fealty, and Inhabiting in this Jurisdiction." [78]

"It is the libertie of the freemen to choose such depities for the General Court out of themselves, either in their owne Towns or elsewhere as they judge fitest." [79]

Also the following:

"And the freemen of any shire or town, have liberty to choose such Deputies for the General Court, either in their own shire, Town or elsewhere, as they judge fittest, so be it they be freemen, and inhabiting this jurisdiction." [80]

From the time when Andros assumed charge of Massachusetts under royal authority until Governor Phipps brought the new charter in 1692 we have no records; for during the Andros régime the general court did not meet. As the charter named the twenty-eight councilors who were to serve for the first year, the first election held under the new charter was simply for deputies for the towns. In this court, which met on June 8th, 1692, we find for the first time the representatives from twenty towns which had formerly been in New Plymouth Colony.[81] This was in accordance with the new charter which placed all this territory in the province of Massachusetts.

The election of May, 1693, was the first opportunity the country had of voicing its approval or disapproval of the councilors named by the king in the charter. At the election

[78] Mass. Col. Laws, 1889, 47 (Revision of 1660). [80] *Ibid.*, 1889, 145.
[79] *Ibid.*, 1889, 49. [81] Mass. Acts and Resolves, VII, 8.

of this date six prominent colonists, former assistants, but who had been left out of the council as named in the charter, were chosen councilors, while ten, in all, of those named in the charter were displaced by new men. Among the six was Elisha Cooke, a prominent Boston man. His election was promptly negatived by Phipps, probably because he had vigorously opposed Phipps' appointment.[82]

This veto of Cooke's name added fuel to the dissatisfaction already felt toward Phipps. Many were opposed to the whole scheme of government under the new charter and so would have opposed any governor under such conditions. The subjecting of laws to a double veto with the long period of uncertainty till word could come of royal approval or disapproval was very distasteful to the colonists who had been accustomed to making their own laws without let or hindrance. In addition to all the above the governor had been involved in two street brawls, first with Brenton, the royal collector of customs, and then with a Captain Short, commander of a royal frigate.

The newly elected House of Deputies met on May 31, 1693, and elected William Bond speaker. It was the day following that the governor refused to approve Cooke.[83] The negativing of Cooke was the turning point in Phipps' career as governor, for soon thereafter petitions and letters poured in for his withdrawal, while in the general court he arrayed against him an opposition which he sought to crush and did, by the enactment of a non-resident representative, act. There were some non-residents in this body. Major John Pynchon had been sent as deputy for Springfield but was chosen a member of the Council, so Benjamin Davis of Boston was selected as his successor.[84] Daniel Allen of Boston represented Oxford.[85]

It was not long until the governor was in a contest with the House over a bill entitled,

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[82] Hutchinson (Second Edition), II, 70. Cooke had opposed the new charter while Phipps and Mather favored it. All three were the colony's agents in England at the time.

[83] Colonial Papers (1693-96), 111.

[84] Mass. Acts and Resolves, VII, 21. [85] *Ibid.*, VII, 20, 29.

. . . "An Additional Bill for Regulating the House of Representatives."

This failed to pass. What its provisions were we do not know, for no copy of its has come down to us. There was also a difference between the governor and the house over the treasurership of the province. The house proving so refractory the governor dissolved it on July 15. On this date, Sewall writes in his diary

. . . "About noon Mr. Willard prays, the Asemblymen being sent for. Presently after the Governor stands up and dissolves the Assembly. Was much disgusted about the old Treasurer, and about the not passing of the Bill to regulate the House of Representatives." [86]

Writs were issued for the election of a new House of Deputies to meet on September 27, 1693. But a quorum did not appear, no deputies coming at all from the counties of Hampshire and York, and, on September 28, new writs were issued for a session to be held on November 8, 1693.[87] When the newly elected House met it elected Captain Nathaniel Byfield speaker. He, though a resident of Boston, represented Bristol at this time,[88] and other non-resident representatives appeared; Daniel Allen of Boston as deputy for Marblehead,[89] and Captain John Browne of Marblehead as deputy for Manchester.[90]

By this time the opposition to the governor in the colony was becoming so great and so many persons were demanding his recall that his supporters desired the general court to petition the king for his retention as governor. This matter met strong opposition in the newly elected House, an opposition which centered in Boston. In addition to having her citizens frequently chosen to represent outlying towns Boston had a larger representation than any other town of the province. By an act passed November 30, 1692, entitled

"An Act for Ascertaining the Number and Regulating the House of Representatives,"

[86] Sewall, I, 380.
[87] Mass. Acts and Resolves, VII, 29.
[88] *Ibid.*, VII, 29.
[89] *Ibid.*, VII, 29.
[90] *Ibid.*, VII, 30.

. . . her representation had been raised by special enactment to four. No other town had more than two.[91]

The governor's opponents charged that because of the objection of the Boston men to vote for a petition favorable to the governor he determined to reduce Boston's power in the House.[92] At any rate he had a clause inserted in a bill already before the House which read as follows:

"That not any Town in this Province shall chuse any Representative, unless such be a Freeholder and Resident in that Town or Towns, such are chosen to Represent." [93]

The title of the bill into which this was inserted was "An Act to prevent default of Appearance of Representatives to Serve in the General Assembly."

Its other provisions differ but little from former laws of the colony on the same subject. In all probability it was the same bill which failed to pass in the May previous.

Whatever brought on the contest, the governor and House were soon in conflict. On November 13, the House demanded the privilege of appointing their own sergeant-at-arms. Their messenger and doorkeeper were appointees of the governor and council and the House felt that their interest would lie with the power that appointed them.[94] On Friday, November 17, the speaker adjourned the House until Tuesday the 21st without consulting the governor. When the House met on the 21st the governor sent them word that he had dismissed the speaker. They at once sent a committee of five to wait on the governor and to ask him for what cause he did this. He replied:

. . . "for sundry disorders committed in the house."

The matter was arranged, without the speaker being dismissed, by the entering on the record the House's acknowledgment of error, request for pardon and promise not to

[91] Mass. Acts and Resolves, I, 88.

[92] See two letters below.

[93] Laws of Mass. (1714), 54; (1726), 55; (1742), 54; (1759), 48; Acts and Resolves of the Province of Mass. Bay, I, 147

[94] Mass. Acts and Resolves, VII, 391, Archives, Vol. 48, 221.

offend again.[95] On the very next day the House approved fourteen items in an account bill but did not approve a proposed grant of £500 to the governor.[96]

On this same day the Council sent to the House the proposed non-residence Act. This at once brought a protest from the House signed by twenty-one members,[97]

". . . alleging the vote was contrary to Charter, Custom of England, of the Province, hindered men of the fairest estates from Representing a Town where their Estates lay, except also resident; might prove destructive to the Province." [98]

There seems to be some doubt whether the twenty-one represented the adverse vote on this measure or whether this was simply a signed protest. The vote on the final passage was twenty-four to twenty-six as we shall see below. That this was simply a protest is borne out by the fact that it was signed by only two of Boston's representatives, Townsend and Thornton.[99] On a bill aimed specifically at their city we should expect them all to vote adversely which they probably did.

The bill was finally passed on November 28,[100] by a vote of 26 to 24 in the House and 9 to 8 in the Council. In the latter body the lieutenant-governor opposed the measure while Sewall supported it.[101]. It will be remembered that he had acted as deputy for Westfield in 1683.[102]

In the opposition which this constitutional innovation aroused Increase Mather was charged with being its author as much as Phipps. If this charge was true it is only another example of the influence of the clergy in the early political life of Massachusetts. That the Mathers were active in the political life of the time is well known, as is Cotton Mather's part in obtaining the new charter and Phipps' appointment

[95] Sewall, I, 385; Mass. Acts and Resolves VII, 391, Council Recs. VI, 309.

[96] Colonial Papers (1693-96), 209.

[97] Mass. Acts and Resolves, VII, 391; Colonial Papers (1693-96), 209.

[98] Sewall, I, 385.

[99] *Ibid.*, I, 386. Boston's representatives in this court were: Major Pen Townsend, Edward Bloomfield, Captain Theophilus Frary and Timothy Thornton. Boston Recs. 1660-1701, 216; Mass. Acts and Resolves, VII, 44.

[100] Acts and Resolves, I, 148.

[101] Sewall, I, 387.

[102] *Ibid.*, I, 57.

as first governor under it. Considering the part Mather played in the appointment and also taking into consideration that he was in a sense the governor's spiritual father, it is not strange that he would have some weight with the administration. Under date of June 8, 1693, Sewall records that there was great wrath among the people "about Mr. Cooke's being refused and 'tis supposed Mr. Mather is the cause".[103]

In a letter of June 12, 1694, most of which will be quoted later, from Nathaniel Byfield to Joseph Dudley in London, regarding the non-resident act, Byfield charges that Mather inspired the act.[104]. In an account of New England's affairs written by a Boston man a few years after the events we have enumerated took place, we find the following:

"It is said, that anno 1693, there were some Boston gentlemen representatives from some of the out-towns, but not agreeable to the then Rev. I. M. ——th——r; Mr. B——f——d for Bristol is mentioned; Mr. M———— of great interest with the weak Gov. Phipps, and with the devotionally bigoted house, procured this act." [105]

Whatever may be the truth in the above charges we do know that Mather was a great admirer of Phipps. His life of Phipps is highly eulogistic throughout and the characteristics which he ascribes to him are hardly borne out by contemporary evidence. When he says,

"had the country had the choice of their own governor, 'tis judged their votes, more than forty to one, would still have fallen upon him to have been the man; and the General Assembly therefore on all occasions renewed their petitions unto the king for his continuance" [106]

he certainly let his zeal impair the truth of his statement.

The law of November 28, 1693, was first operative in effecting the choice of deputies for the general court of May 30, 1694. The puzzling thing is that we do not find protest after protest pouring in from the towns against this inter-

[103] Sewall, I, 379.

[104] Colonial Papers (1693-96), 294-295.

[105] Douglas, Summary I, 506, Hutchinson quotes the above but does not view it sympathetically and calls attention to Douglas' habit of judging men's actions by his personal friendship or dislike for them. (Hutchinson II, 75-80).

[106] Magnalia, I, 202, 207.

ference with a deep-seated custom. Springfield is the only one which did send such a protest, but did it by the hand of a non-resident deputy directly in defiance of the law against which she protested. In town meeting on May 17, 1694, Captain Benjamin Davis of Boston, was chosen deputy and was instructed to lay before the general court the clause in the charter that the . . .

"Representatives for ye Genll Corte may be accepted when chosen in the Province." [107]

But Springfield was not the only town which violated the new law, for when the House met on May 30, 1694, there were six deputies representing towns in which they did not live. When the governor heard this he played a Cromwellian part by rushing into the House hatless and ordering all non-residents to leave.

The only contemporary evidence we have of the events at this particular time is contained in two letters. We can do no better than to quote these quite at length. In a letter dated Boston, June 12, 1694, Nathaniel Byfield wrote to Joseph Dudley in London, an account of this session of the general court.[108]

". . . I had been returned for Bristol, Captain Davis for Springfield, Samuel Legge for Marblehead, Captain Disley[109] for Oxford, Timothy Clarke for Chencford[110] and Ebenezer Thornton[111] for Swansea. On our coming in the governor said that there were many more of the gentlemen of Boston than could serve for that town, and that, for reason which he would give later, I, Davis, Dudley [,] Clarke and Captain Foxcroft[112] should not be sworn. The rest being sworn, not without confusion. I told the Governor that the House of Representatives were proper judges of their own

[107] Burt's History of Springfield, II, 334.

[108] Colonial Papers (1693-1696), 294-295.

[109] In the letters of the time and even in the public records there was great variation and apparent carelessness in the spelling of proper names. The name Disley does not appear in the Records and neither was Oxford represented in that session but Captain Dudley of Roxbury was Medfield's deputy. (Mass. Acts and Resolves, VII, 44). This is the man meant without much doubt for the name Dudley appears later in the letter.

[110] Chelmsford—Acts and Resolves, VII, 45.

[111] Should be Brenton. *Ibid.*, VII, 45.

[112] The records make no mention of a representative of this name but such a man is mentioned by Sewall (1,386) as one of the signers of the petition of protest.

members, but he commanded silence; and when Samuel Legge, having held up his hand among the rest came forward to sign, he was stopped by the governor for being a non-resident of Marblehead. After some discuorse among ourselves, we five agreed to go again to the governor and Council, with myself as spokesman, to claim to be sworn in as duly elected members. We did so accordingly and I make the claim, though the governor kept forbidding me to speak, and threatened me if I did not hold my tongue. We then returned to our own House, having told the Governor that what we had done was the least we could do. In the House of Representatives Captain Legge took his stand and said he would not go out for all the governor, until rejected by the House. The governor, hearing of this, came down to the representatives in fury without his hat, said he had heard that a member against whom he had objected, had refused to leave the House unless the House put him out, and that he wished to know who it was. Legge at once came forward, and the Gov. said he had nothing against him and wished he had been returned for Boston, in which case he could freely have embraced, but as to the others, if the House did not turn them out he would turn them out himself. Now if the making of such a law (which we hope you will get negatived), and the refusal to swear duly elected members be allowed, so that a governor shall be able to pack the Assembly, farewell to all good; and I shall find another place to live in.

That law is contrary to our Charter, though to our shame be it spoken, we infringe on our own privileges simply to be revenged of particular persons. Mr. J. M.[113] said a month ago that, but for myself, that law would not have been passed. . . . ."

The other letter,[114] bearing date of November 1, 1694, was evidently written by a visitor in the colony to a friend in London. We have not the name of either the writer or the addressee.

"It was very surprising to me to see the laborious methods taken to obtain an address from the general assembly here, for the continuance of Sir William in the government. The opposers were gentlemen, principally of Boston, who were too

[113] In the Records immediately following these initials we find the parenthesis (Joshua Moody or Increase Mather).

[114] Hutchinson, II, 79-80.

near Sir William to think well of him, but served in the House for several towns and villages at some distance, where some of them were born, and others had their estates and improvements above any dwellers in the place for which they served. To be rid of them all at once, a bill was brought in, or rather a clause brought into the bill that no man whatsoever should serve in the house of commons for any town, unless where he did at that time live and dwell, which passed with the dissent of twenty-four, the whole house consisting of fifty and with some heat in the upper house. Sir William hereupon rushes into the house of commons and drives out the non-residents, and I not mistaken if either for estates or loyalty they left any of their equals in that house."

Remembering the political independence which characterized Massachusetts throughout her colonial and provincial history one would expect this sweeping constitutional change to arouse a storm of opposition. But it evidently did not. The town records of Boston and the other towns are practically silent on the matter. A perusal of the members elected to the next general court which met on May 29, 1695, will not show a single case of non-resident representation.[115] Whether the importance of the change was overshadowed by the excitement and terror of the witchcraft craze which had just passed its zenith it is impossible to tell, but it certainly did not meet with the antogonism we might expect.

Evidently there were still some who believed that under the old method men of more ability were elected to the House of Deputies. This was probably true. Ability of the House of Deputies as a whole had been purchased at the expense of the independence of the outlying towns and at the expense of giving Boston a preponderate influence in colonial affairs.

Sixty years later a colonial historian in commenting on this change in the constitution plainly shows where his sympathies lay:

"A gentleman of good natural interest and resident in the province; a man of reading, observation, and daily conversant with affairs of policy and commerce, is certainly better qualified for a legislator, than a retailer of rum and small

[115] Mass. Acts and Resolves, VII, 72-73.

beer called a tavern keeper, in a poor, obscure, country town, remote from all business; thus this countryman will not be diverted from the most necessary and beneficial labor of cultivating the ground, his proper qualification, to attend state affairs, of which he may be supposed grossly and invincibly ignorant; thus the poor township, by gentlemen at large serving gratis or generously as the quota of the township, will be freed from the growing charge of subsisting a useless representative."[116]

Governor Phipps' action seems to have settled the matter in Massachusetts for all time. In 1695 and again in 1698 the General Court prescribed the form of writ to be used in calling a meeting of that body. These two are practically identical, the latter one reading in part:

"William the Third . . . to our Sheriff. . . . We command, that upon receipt hereof, you forthwith make out your Precepts, directed unto the Selectmen of each respective Town within your Precinct, Requiring them to cause the Freeholders, and other Inhabitants of their several Towns, duly Qualified . . . to assemble at such Time and Place, as they shall appoint, to Elect and Depute one or more persons (being Freeholders and resident in the same Towne) . . . . ."[117]

The next time we find the matter mentioned is in an act entitled,

"An Act in addition to an act entitled 'An Act for Ascertaining the number, and regulating the House of Representatives',"[118]

passed on April 24, 1731. It contains the usual residential qualification.

Nothing further appears in Massachusetts' law, so the requirement must have become a fully accepted part of state law and custom. In the constitution of 1779-1780 the principle was maintained[119] the matter not even being discussed in

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[116] Douglass, Summary I, 507.

[117] Mass. Acts and Resolves, I, 315; Acts and Laws, 118-119, Act No. 80.

[118] *Ibid.*, II, 592, 593.

[119] Journal of the Convention. Senate, Chap. I, Sec. II, Art. V; House, Chap. I, Sec. III, Art. IV.

the convention. Some qualifications for representatives were debated[120] but the one that he should live in the district represented had by this time become so well established that it found no opponents.

[120] Journal of the Convention, 77, 125.

NEW PLYMOUTH

THE governing body of New Plymouth as in the other New England colonies was the general court. This consisted of the governor, assistants, and all the freemen of the colony. Until 1632 the settlement was compact and hence it was no hardship for the freemen to attend the three annual meetings of the Court. But about this time outlying settlements began to spring up and we find Governor Bradford and others bemoaning the fact.[1]

The first reference to the expansion of settlements found in the records of the colony is in 1636 when a committee consisting of four from Plymouth, two from Scituate, and two from Duxbury (Duxburrow) was appointed by the general court meeting on October fourth of that year, to join with the governor and assistants in codifying the laws of the colony.[2] An expansion of settlements brought with it the inevitable demand for representation and this was granted on March 5, 1639, by the following act:

"Whereas complaint was made that the freemen were put to many inconveniences and great expenses by their continual attendance at the Courts. It is therefore enacted by the Court for the ease of the several Colonies and Townes within the Government That every Towne shall make choyce of two of their ffreemen and the Towne of Plymouth of foure to the Committees or Deputies to joyne with the Bench to enact and make all such laws and ordinances as shalbe judged to be good and wholesome for the whole. . . . ."

Here follows a provision by which the freemen at the general court of election could repeal any law so passed and enact one to suit themselves. The act then continues:

". . . and that every Township shall beare their Committees charges and that such as are not ffreemen but have taken the Oath of fidelitie and are masters of famylies and Inhabitants of the said Townes as they are to beare their part in the charges of their Committees so to have a vote in

[1] Bradford, History of Plymouth, 303. [2] Plymouth Records, I, 43-44; XI, 6.

the choyce of them provided they choose them onely of the ffreemen of the said Towne whereof they are."[3]

At a general court which met on June 4, 1639, deputies from seven towns appeared as a result of the privilege granted by the above law.[4] But this does not mean that New Plymouth's general court was at once changed from a primary to a representative assembly. This transition was not completed for a number of years for freemen still appeared in person at the annual court of Election.[5] This act of 1639 plainly lays down a residential qualification and that it was obeyed is shown by a careful checking of the lists of deputies or "committees" between 1639 and 1646, the date of the next law on the subject. Such a checking fails to reveal a single violation of the residential requirement.

The law referred to above, passed on October 20, 1646, confirmed the practice of all freemen coming to the court of election, but the opening sentence shows that a residential qualification was still operative for deputies:

"Whereas the Townes formerly were to send their deputies (which must arise out of their freemen) to attend the 3 general Courts. . . . ."[6]

Plymouth laws were all revised in 1658.[7] In this revision the law of 1639 regarding Deputies reads:

". . . It is therefore enacted by the Court and the authorities thereof . . . that every towne shall make choise of two of their ffreemen . . . provided they choose them only of the ffreemen of the same towne whereof they are. . . ."[8]

Also the law of 1646 when revised retained exactly the same wording it formerly had.

The next and last revision of law in New Plymouth colony was in 1671. Article 7 of the chapter on Courts reads:

"It is Enacted, That each Township in this Jurisdiction do Annually, Elect and Choose one or two fit men out of the Freemen, for their Deputies. . . ."[9]

[3] Plymouth Records., XI, 31; Brigham, Laws, 63.
[4] *Ibid.*, I, 126.
[5] *Ibid.*, III, 174; XI, 155.
[6] *Ibid.*, XI, 54.
[7] *Ibid.*, XI, Parts II and III.
[8] *Ibid.*, XI, 169.
[9] Brigham, 259.

While this does not specifically mention that only a resident must be chosen, yet in the light of what had gone before a residential qualification is implied without a doubt.

So we have in New Plymouth the interesting example of a colony differing from all her New England neighbors in regard to a residential qualification for deputies in the general court. The question which naturally presents itself is, Why this difference? The colony Records themselves give us no answer, neither do the contemporary writings of the time such as those of Governor Bradford and Secretary Morton. Hence any reason assigned must be pure inference.

But several possibilities suggest themselves. The amount of importance to attach to any one of them must be left to the judgment of the reader:

(1) Considering the compactness of the colony during most of its separate existence it is not surprising that in practice the towns chose residents to represent them. The surprising thing is that it was required by law.

(2) No city developed at the political centre of the colony, as in Massachusetts, on which the remote towns could draw for able representatives. Plymouth (town) had a hard time to hold her own and at the time of the colony's absorption by Massachusetts there were several towns in the colony which rivaled her in size and importance.

(3) New Plymouth never developed a political consciousness as did Massachusetts, for example: No political parties developed and no governor, so far as the records show, ever met with any opposition on election day. The position and title of freeman with its attendant privileges and duties were not eagerly sought as in some colonies. On the other hand, that dignity, with the political responsibilities attached, was often evaded.

(4) The explanation for which we are searching may be found in Plymouth's strict conformance to English law. The contrast between New Plymouth and Massachusetts in this regard is plainly evident on every page of the colonial records. Writs, which in Massachusetts were issued in the name of the colony, in Plymouth, were issued in the name of the ruling sovereign of England while the royal commissioners of 1664 who were received with scant courtesy by Massachusetts were loyally welcomed by New Plymouth.

In all things, New Plymouth was loyal to English law and tradition.

In England at this time although non-residence representation was common, yet the strict letter of the law demanded that a member of the House of Commons must be a resident of the county or borough returning him.[10] In New Plymouth the requirement may thus have been a conscious adaptation of English law despite the tendency of English practice.

[10] See Chapter I.

Note: In an attempt to find if any town in the colony ever attempted to violate the requirement of sending a resident to represent it in the general court, I have checked, systematically and thoroughly, every list of delegates which appears in the records. Not a single case of non-residence representation is shown.

NEW HAMPSHIRE

THIS colony presents the most varied legislative history of any of the New England colonies. In 1641 Massachusetts extended her control over what was called the Piscataqua territory and from that date until 1679 the towns of this territory were represented in the general court of Massachusetts. The cases of non-resident representation during these years have already been given in the chapter on Massachusetts.

When Randolph was urging his claims against Massachusetts in 1677 the Privy Council submitted the conflicting claims regarding territorial and governmental control of New Hampshire to the law officers of the crown. Two points of their decision were:

(1) Massachusetts' northern boundary extended three miles north of the Merrimac, and

(2) Massachusetts had no rights of government over New Hampshire.[1]

Through the efforts of the Mason heirs, aided by Randolph, Massachusetts was ordered, in 1679, to withdraw governmental control from New Hampshire. By a commission which passed the Great Seal, September 18, 1679,[2] provision was made for a president and council. This was brought to Portsmouth on January 1, 1680, by Edward Randolph, and according to Belknap the local men named in it as president and council reluctantly assumed their new duties.[3] Their reluctance shows that the change was not a welcome one. There is little doubt that the majority of people of the colony wished to remain under the government of Massachusetts.

Besides the six men named as councilors by the commission the council and president were authorized to choose three other councilors. The president and five councilors were a quorum for transacting business.[4] The commission

[1] Colonial Papers, 1677-1680.
[2] New Hampshire Provincial Papers, I, 373.
[3] Belknap, I, 175.
[4] N. H. Prov. Papers, I, 375.

further provided that within three months after the council was sworn in they were to issue a summons for a general assembly of the province

. . . "using and observing there such rules and methods—as they shall judge most convenient." [5]

In the writs for the first election under this provision the electors were mentioned by name,[6] an unusual proceeding and one that differed radically from the other New England colonies whose towns were the sole judges of the qualifications imposed for citizenship.

This assembly met at Portsmouth on March 16, 1680. There were eleven deputies present; three each from Portsmouth, Dover, and Hampton, and two from Exeter.[7] Among the laws passed by this assembly was one regulating the election of deputies. This provided that the constables of each town were to

. . . "call together the freemen of their respective towns on the first Monday in February, annually and from among themselves to make their selection of Deputies to ye General Assembly." [8]

A strict interpretation of this would mean, without doubt, that a town was restricted to the choice of one of its own citizens. That such was the intention of the law hardly seems probable. It is more probable that a chance wording makes such an interpretation possible. The assembly was to meet in Portsmouth on the first Tuesday of March, annually. The number of deputies was limited to eleven, distributed among the towns in the same proportion mentioned above.[9]

New Hampshire continued to be governed by a council and assembly composed almost entirely[10] of local men until 1682. In March of that year Edward Cranfield was appointed governor. His commission was dated May 9, 1682, and he arrived in the province on October 4,[11] of the same year.

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[5] N. H. Prov. Papers, I, 379.
[6] N. H. Prov. Papers, I, 408.
[7] Belknap, I, 177.
[8] *Ibid.*, I., 177.
[9] *Ibid.*, I, 408.
[10] Two Englishmen, Mason and Chamberlain, had been added.
[11] N. H. Laws, I, 48.

His commission was long and elaborate and was similar to those which Great Britain was beginning to issue to royal governors. With only one provision of this are we interested. That is the one providing for the continuance of the assembly. The governor was granted full power and authority:

". . . from time to time as need shall require to summon and call general assemblyes of the freeholders within your government, in such manner and form as by the advice of our said Council you shall find most convenient for our Service and the good of our said province. . . ." [12]

The period from 1679 to 1686 was New Hampshire's first experience as a separate provincial government. During this time seven general assemblies met, the last one convening on July 22, 1684.[13] During Cranfield's administration he was in constant trouble with the various assemblies and one would scarcely meet until angered by some act or by its refusal to do his bidding he would dissolve it. Consequently the legislative record for that period is very brief. Of these seven assemblies we know the names of only the deputies constituting the first one. So there is absolutely no way to tell to what extent, if any, non-residence representation was practiced in New Hampshire during its first experience as a separate province.

From the arrival of Joseph Dudley as President of the Dominion of New England, on May 25, 1686, to the uprising against Andros on April 18, 1689, New Hampshire was again a part of an association of colonies arbitrarily combined into one government. It was during this period that the representative assemblies of all New England were in abeyance.

When the officials of the Dominion had been sent to England as prisoners the commonwealth governments of New England at once re-assumed their old form. New Hampshire, a royal province, but without a royal official in it, was left without government of any kind,

. . . "either by royal commission, union with other colonies, or federation of the towns themselves." [14]

[12] N. H. Laws, I, 50. [13] *Ibid.*, I, 74. [14] *Ibid.*, I, 259.

This portion of New Hampshire history has been called the Second Period of Local Self-Government.[15] A strong effort was made to bring about a federation of the towns. Three of the towns favored this but Hampton was divided into two factions over the question. A proposed form of government[16] was drawn up by a convention, composed of deputies from each town, which met in Portsmouth on January 24, 1690. Hampton's objection, together with the knowledge of their inadequate means of defence in the war whose ravages were just beginning, forced the towns of New Hampshire to again turn to Massachusetts. On February 20, 1690, a petition signed by about 350 inhabitants of New Hampshire, was drawn up praying to be taken under the protection of Massachusetts.[17] The governor and council of Massachusetts approved this petition on February 28, 1690, and it was confirmed by the general court on March 19.[18]

During this second union with Massachusetts, Portsmouth was the only town which sent deputies to Boston. In 1690 its deputies were Elias Stileman and John Foster. The former was a resident of Portsmouth but the latter lived in Boston. He was one of the town Commissioners at this time and also one of the three commissioners[19] for conducting the first Intercolonial War which had already begun. In 1691 her deputies were John Pickering, a citizen, and Richard Waldron, of Dover.[20] In 1692 Waldron again represented Portsmouth, this time serving alone.

At this time it was the wish of a majority of the people of New Hampshire to remain under the government of Massachusetts and petitions were sent to that effect to the agents of Massachusetts who were in England soliciting for a new charter.[21] What brought forth these petitions was the knowledge that Samuel Allen, a merchant of London who had purchased the Mason Claims, was striving to have himself appointed governor of New Hampshire. Allen's importunate

[15] N. H. Laws, I, LXXXII.
[16] *Ibid.*, I, 260.
[17] N. H. Prov. Papers, II, 34-39.
[18] *Ibid.*, I, 267.
[19] N. H. Laws, I, 378, 400, 401, 420, 843.
[20] *Ibid.*, I, 14.
[21] Belknap, I, 239.

demands were granted and a commission was issued to him as governor on March 1, 1692.[22] By this, John Usher, a merchant of Boston, and a son-in-law of Allen, was named as lieutenant governor. Usher was in London at the time. His commission provided for an assembly which the governor could call with the advice and consent of the council. Members of the assembly were to be elected by freeholders after each one had taken

. . . "the oaths appointed by Acts of Parliament to be taken instead of the oaths of Allegiance and Supremacy and subscribed the Test." [23]

In Allen's instructions he was again cautioned to make sure that members of the assembly were elected only by freeholders "as being most agreeable to the custom of England. . . ." [24]

Nine men, besides Usher, were named in the instructions, as constituting the council. Three were to be a quorum but no important act was to passed with less than five present except in an emergency.

Government under the new régime began with the arrival of Usher on August 13, 1692. The first session of the general assembly was held on October fourth.[25] This assembly numbered twelve and all the men were residents of the towns they represented. An act passed on the last day of the session was one regulating the pay of the representatives.[26] They were to receive three shillings per day

. . . "to commence from their coming out until their return home allowing one day for coming out and one day for returning."

This was to be paid by their respective towns.[27]

Lieutenant-governor Usher was not popular in New Hampshire and he was opposed at every turn by the anti-Allen party. To them he was the embodiment of the old Mason claim to territorial rights. In addition he never lived

[23] N. H. Laws, I, 499.
[24] *Ibid.*, I, 510.
[25] *Ibid.*, I, 503.
[26] *Ibid.*, I, 517.
[26] From this time on in the records this word is used instead of deputies.
[27] N. H. Laws, I, 533.

in the province but continued to reside in Boston. Finally this opposition succeeded in having William Partridge, a citizen of the province, appointed lieutenant governor. He was appointed June 26, 1696, and took office December 14, 1697.[28] Partridge acted as lieutenant governor until September 15, 1698, when Governor Allen appeared in the province[29] for the first time. His commission was still operative although Lord Bellomont's had already been issued as governor of New York, Massachusetts, and New Hampshire.

New Hampshire's seventeenth general assembly adjourned shortly after Governor Allen's arrival, that is, on October fourth.[30] On December 18, 1698, he issued a summons for the next assembly. In this summons appears for the first time any specific reference to a residential qualification for representatives. Because of the extra-royal tone of the summons quite a long quotation is given:

"William the Third, by the Grace of God King, etc., To our Sheriff or Marshall of our Province of New Hampshire, Greeting:

We command, that upon receipt hereof, you forthwith make out your precept directed unto the Selectmen of each respective Towne within our Province of New Hampshire requiring them to cause the Freeholders and other Inhabitants of their several Townes, duly qualified, to assemble at such time and place as they shall appoint, to elect and depute, one or more persons, (being freeholders and residents in the same towne) according to the number set and limited by the Act of the General Assembly . . . to serve for and represent them respectively in a great and General Court or Assembly by us appointed to be convened . . . In New Castle upon Thursday, the fifth day of January next ensuing . . . Hereof you may not fail at your peril. Witness, Samuel Allen, Esq., Governor and Commander in Chief in and over our province of New Hampshire aforesaid. Given at New Castle under the Public Seal of our said Province, the 18th day of December, in the tenth year of our reign, A. D. 1698.

By Command,

SAMPSON SHEAFE, Secy." [31]

[28] N. H. Laws, I, 515.
[29] N. H. Prov. Papers, II, 277.
[30] N. H. Laws, I, 506.
[31] N. H. Prov. Papers, II, 283-284.

If we seek a reason for this new qualification for representatives it is not easy to find. That it was meant to be emphatic is shown by the parenthesis which appears in the summons.

Non-residence representation had not been the practice in New Hampshire since it had been given a separate form of government. From the appointment of Governor Allen to the time this summons was issued ten general assemblies had met; most of them of two sessions. A careful checking of the lists of representatives shows but one case of non-resident representation. In the assembly of May 15, 1695, Newcastle was represented by Elias Stileman of Portsmouth. He had represented Portsmouth in October, 1692, and March, 1693.[32] Neither had the governor met with sharp opposition centering in one town as was the case between Governor Phipps and Boston. It may be possible that the same requirement forced upon Massachusetts by a royal governor furnished the incentive for this.

Since this rule was not by order of the council or by enactment of the assembly but by proclamation the question of its legality might be raised. Turning to the governor's commission we find the following:[33]

"And we do hereby give and grant unto your full power and authority with the advise and consent of our said Council from time to time as need shall require to summon and call assemblies of the freeholders within your government in such manner and form as by the advice of our Council you shall find most convenient for our service and the good of our said province."

The clause in the above

. . . "in such manner and form—you shall find most convenient"

. . . probably gave the governor ample authority for his proclamation. And it was obeyed. When the assembly met on January 5, 1699, there was no violation of this order such as we saw in Massachusetts immediately following the enactment of a residence qualification for deputies.

[32] N. H. Laws, I, 13, 517, 545, 575. [33] *Ibid.*, I, 503.

Lord Bellomont now arrived in New Hampshire and was recognized as governor on July 31, 1699. An assembly which met at his call and the first one elected since the one chosen under Allen's new rule enacted a law regarding qualifications of representatives in which residence was not mentioned. But before we examine this it will be well to take up Lord Bellomont's Commission and Instructions.

The portion of his commission referring to an assembly reads exactly as the quotation given above from Governor Allen's Commission.[34] In his instructions two clauses only refer to the assembly. By one he is admonished to see that members of the assembly are elected only by freeholders and by the other he was ordered to reduce the salary of the members to a point where it would not be too heavy on the towns. He was, however, to use his discretion about the latter.[35] The first assembly under Governor Bellomont met on August 7, 1699.[36] On the seventeenth a law was passed entitled

"An Act to Return Able and Sufficient Jurors to Serve in the Several Courts of Justice and to Regulate the Election of Representatives to serve in the General Assembly within this Province." [37]

This law was approved by Bellomont shortly before leaving the province.[38]

The clause of this act referring to representatives is entitled

"Qualification of Representatives and Electors"

. . . and reads in part:

"And be it further enacted by the authority aforesaid, that no person inhabiting within this province other than freeholders of the value or income of forty shilling per annum, upwards, in land, or worth fifty pounds sterling at the least in personal estate, shall have any vote in the election of Representatives; or be capable of being elected to serve in the General Assembly. . . ." [39]

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[34] N. H. Laws, I, 612-620.
[35] *Ibid.*, I, 623.
[36] *Ibid.*, I, 635.
[37] *Ibid.*, I, 657.
[38] *Ibid.*, I, 640.
[39] *Ibid.*, I, 659.

Whether no mention of a residential requirement was approved by Governor Bellomont, as he had a perfect right to do under his instructions, or whether this omission of any reference to residence was a studied one on the part of the assembly and it chose this way of putting itself on record as opposing the requirement laid down by the former governor, are questions which the available data do not answer. But there is not doubt that the people of New Hampshire regarded the coming of Bellomont as a return to their accustomed governmental forms and regulations. Belknap, after speaking of the return of Partridge to the office of lieutenant governor and the reinstatement of some of the council whom Allen had removed, says,

"The government was now modelled in favour of the people, and they rejoiced in the change, as they apprehended the way was opened for an effectual settlement of their long continued difficulties and disputes." [40]

Under succeeding governors we find no attempt to impose a residential requirement upon the province in the choice of its representatives, although they had, or at least some of them had, as much authority to do so as did Allen. For example, Joseph Dudley's commission which was issued July 13, 1702. The clause in this which gave him power to call an assembly reads exactly as did the corresponding clause in Allen's and Bellomont's commissions.[41]

The commissions of later governors were worded slightly differently and were perhaps meant to leave the rules and regulations governing the assembly in its own hands. Jonathan Belcher became governor of New Hampshire in 1730. His commission reads in part:

"And we do hereby give and grant unto you full power and authority with the advice and consent of your said Council from time to time as need require to summon and call General Assemblys of the Freeholders and Planters within your Government in manner and form according to the usage of our Providence of New Hampshire. . . ." [42]

[40] Belknap, History of New Hampshire, I, 305.
[41] N. H. Prov. Papers, II, 368.
[42] *Ibid.*, IV, 638.

The commission of Bening Wentworth, the last royal governor of New Hampshire, reads exactly as does that of Belcher.[43] The point wherein these two differ from the earlier commissions is in the words:

". . . in manner and form according to the usage of our Province of New Hampshire. . . ."

The only demand made in these commissions on those elected as representatives was that they should take certain oaths showing their loyalty to the crown.

Between the time of the act of 1699 and the end of the provincial period of New Hampshire history only one act was passed which laid down qualifications for representatives. This was in 1728 and was an act providing for triennial assemblies. It referred to one formerly passed and submitted to the Lord Commissioners of Trade and Plantations. Nothing having been heard—

. . . "it is presumed that if it had been disagreeable to his Majesty, his disallowance thereof had long since been made known." [44]

The portion of the act in which we are especially interested reads:

"And that no person shall be allowed to serve in the house of representatives as member thereof, unless he hath a real estate within this province of the value of three hundred pounds; and the qualifications of the person so elected shall be determined by the house of representatives for the time being."

The only qualification demanded of a representative by this act was a property one and it is interesting to note that the same is true of electors.

"And no person shall have the liberty of voting in the choice of representatives, other than such who has a real estate of the value of fifty pounds within the town, parish or precinct where such election shall be; . . . And be it further Enacted by the Authority aforesaid, That any person, having real estate of fifty pounds as abovesaid, shall have

[43] Acts and Laws of New Hampshire (1771), 3. [44] *Ibid.*, (1771), 166.

the liberty of voting in the town, parish or precinct, where such his estate shall be, although he be not an inhabitant in said town, parish or precinct at the time of such election." [45]

Belknap says of this that it

". . . was the only act which could be called a constitution or form of government, established by the people of New Hampshire; all other parts of their government being founded on royal commissions and instructions. But this act was defective, in not determining by whom the writs should be issued, and in not describing the places from which Representatives should be called, either by name, extent or population." [46]

This effect which Belknap points out is apparent as one reads the records. There was contest after contest between the governor and assembly over the right to grant new towns the right to representation.

It seems clear from the governor's commission and from the practice that had been followed in New Hampshire from the first that it was the governor's privilege to name a new town in the election writs whenever he thought the conditions there justified it. The most bitterly contested case of this sort occurred in 1749 when the House and Governor Wentworth came into conflict over this very question. On January 10, 1749, the governor vetoed the House's choice of speaker because they refused to seat two members chosen from Chester and South Hampton. The House stood firm that the granting of the right of representation to a town was by its own action and not by the king's writ. Nothing was accomplished the whole life of the assembly as it was kept under short adjournments and prorogations until the triennial act dissolved it.[47]

The first and only case of non-residence representation in New Hampshire which I have been able to find was in 1749

[45] The above act provided that the session of the assembly passing the act should end on April 13, 1731, and that the provisions of the act should apply to the choice of succeeding assemblies.

[46] Belknap, II, 90.

[47] N. H. Prov. Papers, VI, 74-77. For another interesting phase of this contest see Fry, New Hampshire as a Royal Province, 139-141.

when Richard Waldron (the third of the same name) appeared as a representative for Hampton.[48] He served in this capacity until 1752. Waldron was a resident of Portsmouth and the leader of the opposition to Governor Wentworth. Adams in his Annals of Portsmouth says:

". . . but soon after Governor Wentworth commenced his administration, he suspended Mr. Waldron as Counsellor, removed him from office, and appointed Colonel Atkinson Secretary and Andrew Wiggin, Judge of Probate. He remained a private citizen, until the beginning of the year 1749, when he was solicited by his friends in town to be a candidate to the General Court which was to meet in January; but he absolutely refused. In the meantime, the town of Hampton elected him their representative, without giving him any previous intimation of their design; they notified him of their choice by a Constable, and after some consultation he accepted the appointment." [49]

When the assembly met Waldron was elected speaker but the Governor negatived the choice. This was the beginning of the contest already noted above.

The provincial period of New Hampshire closes with no residential qualification for representatives in force, and, though not forbidden, we have seen that non-residence representation was not practiced. One reason for this was the fact set forth in the following statement of Governor Belcher. In 1733 the Assembly[50] complained to Belcher of his frequent dissolutions. He replied:

". . . Nor do I see any great Inconvenieny in the dissolution of an Assembly since there are but twelve Towns in the Province that send Representatives and of which the most remote is not a day's journey from the place where you commonly sit. . . ." [51]

New Hampshire did grow slowly as it suffered severely from Indian raids in all the intercolonial wars. Not until the period between the last intercolonial war and the Revolution

[48] Dow, History of Hampton, I, 567; N. H. Prov. Papers, VI, 70.
[49] Adams, 191-192.
[50] General Assembly is the correct term for the lower house of New Hampshire's law-making body from 1679 to 1775. After 1775 General Court is the correct term.
[51] N. H. Prov. Papers, IV, 698.

did outlying settlements spring up in any number. During those years the assembly increased constantly in numbers and at the end of the provincial period had thirty-four members.

New Hampshire claims the distinction of being the first state to adopt a constitution in response to the suggestion of the Continental Congress. A convention of representatives from the towns met in Exeter on January 5, 1776, and resolved themselves into a house of representatives as they had been authorized to do. The rules under which they had been elected were similar to those in force when the state was a royal province. The towns were not required to choose residents.[52] Immediately after assuming the authority of a house of representatives the body drew up a form of government for New Hampshire.[53] This is called the state's first constitution. As it was hoped the war would be of brief duration the instrument was neither complete nor precise. No qualifications for either representatives or councilors were included in it.

In 1778 a constitutional convention met at Concord[54] to frame a new instrument of government, but what the result of their labor was we do not know, for the journal of the convention has not been found. But the following year, 1779, a constitution was framed, submitted to the people and rejected.[55] The clause of this respecting representatives reads as follows:

"All male inhabitants of the State of lawful age, paying taxes, and professing the protestant religion, shall be deemed legal voters in choosing counsellors and representatives, and having an estate of three hundred pounds, equal to silver at six shillings and eight pence per ounce, one-half at least whereof to be real estate, and lying within this State, with the qualifications aforesaid, shall be capable of being elected." [56]

The next attempt to frame a constitution was in 1781. The convention met at Concord in June and finished its work

[52] N. H. Prov. Papers, VII, 606.
[53] *Ibid.*, VIII, 2-5.
[54] *Ibid.*, IX, 834-837.
[55] *Ibid.*, IX, 837-842.
[56] *Ibid.*, IX, 839.

in September, and it too was rejected at the polls.[57] This convention made a decided change from the customary practice of representation. In the plan submitted to the people there were to be fifty members of the House of Representatives apportioned among the counties as follows:

Rockingham, twenty,
Strafford, eight,
Hillsborough, ten,
Cheshire, eight,
Grafton, four.

These were to be chosen by county conventions, out of their own number, instead of by the people directly. Each town having rateable polls could select one delegate to said convention and larger towns in proportion. The qualifications for a delegate to these conventions were that he should be a Protestant—

"and for two years next preceding his election an inhabitant of the town, parish or association, for which he may be chosen; . . ." [58]

When the convention assembled it was to divide each county on the following basis:

"Each county shall contain as many districts as the same shall have representatives, and the districts in each county chall be so divided by the respective annual conventions, as each shall contain equal number of reteable polls, or as near as may be" [59]

When this had been done:

". . . each convention shall elect by a majority of written votes out of the members who are chosen to compose such convention a representative for each district; and living within the district for which he may be chosen." [60]

The convention probably felt this matter of electing representatives would meet with objections for in its address to the people it said:

[57] For this constitution in full see N. H. Prov. Papers, IX, 852-877.
[58] An Address of the Convention for Framing a New Constitution, etc., 39.
[59] *Ibid.*, 40. [60] *Ibid.*, 41.

"This mode will be found, perhaps, as free, equal, and perfect, as any that can be devised. The objection, that in this way each town will not know, nor have the power of designating its own representative, will, perhaps, on examination, be found one of the strongest arguments in its favor." [61]

Their idea was that representatives would be chosen without the bitter partisan rivalry which sometimes accompanied the town elections. That the plan was rejected can be seen from the new constitution which was submitted to the people in 1782 and from the address accompanying it. In this, as had been the custom, the towns were the unit of representation. The qualifications of representatives were as follows:[62]

"Every member of the house of representatives shall be chosen by ballot and for two years at least next preceding his election shall have been an inhabitant of this State, shall have an estate within the Town, Parish or place which he may be chosen to represent of the value of one hundred pounds; . . . shall be at the time of his election an inhabitant of the Town, Parish or place he may be chosen to represent; shall be of the Protestant Religion, and shall cease to represent such Town, Parish or place immediately on his ceasing to be qualified aforesaid. . . . ." [63]

Here we have for the first time a definite law requiring a representative to be a resident of his district. But this constitution shared the fate of its predecessors and was rejected. Another convention met in Concord in June, 1783. The constitution framed[64] was adopted October 31, 1783, and went into effect on June 1, 1784. Its provisions regarding qualifications for representatives[65] are exactly the same as those of the proposed constitution of 1782 and so do not need to be repeated.

We have now reached a point where we have a residential qualification for representatives written into the fundamental law of New Hampshire and this fact automatically closes our study of this state.

[61] An Address of the Convention for Framing a New Constitution, etc., 11.
[62] For complete constitution see N. H. Prov. Papers, IX, 877, 896.
[63] *Ibid.*, IX, 887.
[64] *Ibid.*, IX, 896, 919.
[65] *Ibid.*, IX, 907-908.

RHODE ISLAND

THE independent settlements around Narragansett Bay were given the opportunity of becoming a colony by the charter of March, 1644.[1] This was peculiar in that while relieving them somewhat from the encroachments of their neighbors on three sides, it yet left to them the organization of a government.

The first assembly under this charter did not meet until May, 1647, at Portsmouth.[2] The principal reason for this delay was the independence of each local town. Natural conditions probably had something to do with it. It is altogether probable that but for the constant pressure from their territory-hungry neighbors union would not have come even at this date. This assembly was both a primary and a representative assembly. A majority of the freemen were present while Providence sent representatives.[3] Three towns, Providence, Newport, and Portsmouth were named in the charter, but Warwick was now admitted to equal share in the government.[4] The official name of the colony according to this charter was Providence Plantations.

The assembly of May, 1647, declared the government to be

". . . Democratical, that is to say, a government held by ye free and voluntary consent of all, or the greater parte of the free inhabitants."[5]

It also provided for the use of the ballot in all elections.[6] This assembly did not pass a specific act creating a general court as they assumed the form and functions of such a body. But in an obscurely worded paragraph they did provide for representation of the towns by "committees of six".[7] A specific provision was made for a court of election to meet annually on the first Tuesday after May 15,

". . . If the weather hinder not."[8]

John Coggeshall was elected president, along with four assist-

[1] R. I. Col. Recs., I, 143-146.
[2] *Ibid.*, I., 147.
[3] Staples, Annals of Providence, 61.
[4] R. I. Recs., I, 148.
[5] *Ibid.*, I, 156.
[6] *Ibid.*, I., 148.
[7] *Ibid.*, I, 149. Arnold, I, 202.
[8] *Ibid.*, I, 149.

ants, one from each town. Later in the session under the heading General Officers, provision was made for all of these to be chosen at the annual court of elections.[9] In referring to the legislative body of the colony we will use the word assembly although that was not its correct name until after the charter of 1663. Before that date it was called the "Representative Committee" or the "General Court of Commissioners", usually the latter.

When the second asembly met at Providence on May 16, 1648, we find six representatives present from each town. Also at this time the representative system was definitely established by the following:

"It is ordered that six men of each Towne shall be chosen, in whom ye General Courte shall continue: and each Towne here shall have the choice of their men if they please; or if any town refuse, the Courte shall chose them for them. . . ."[10]

In 1650 the assembly ordered that

. . . "a committee of six men of each Towne shall be chosen out of each Towne to meet four dayes before the next General Courte, and to have the full power of the General Assemblie, and each committee man to be allowed two shillings and six pence per man a day by the Towne that chose them. . . ." [11]

Again, in October, 1650:

"Ordered, that the representative committee for the Colonie shall always consist of six discreet, able men, and chosen out of each towne for the transacting of the affairs of the Commonwealth. . . ." [12]

Both of these acts of 1650 would seem to be open to the interpretation that the towns were limited to a choice of citizens as "committee men". Whether this was the case cannot be definitely stated. There were cases of non-residence representation, as we shall see later, but these all may have been the result of the assembly exercising its right of filling a town's quota of committee men in case the town failed to elect its full number.

[9] R. I. Recs., I, 191.
[10] *Ibid.*, I, 209.
[11] *Ibid.*, I, 228.
[12] *Ibid.*, I, 229.

The next act on the subject of representation was passed in 1651. By this time Coddington had arrived with his commission as governor of Rhode Island. So the colony was separated into two parts. The mainland towns, Providence and Warwick, continued the government under exactly the same form as when the colony was united. The assembly met alternately in Warwick and Providence, just as before it had met at each of the four towns in turn.

Feeling perhaps that the changed conditions demanded new provisions regarding the assembly an act was passed in 1651 which ordered

". . . that the lawe makinge Assemblie of this Collonie shall consiste of six men of every Towne of this Collonie; and that these six men of every Towne, shall be chosen by the free inhabitants of every severall Towne, . . . and in case there be not a full appearance, the townsmen or men of the defective Towne or Townes that appeare, shall make up their number by choosing in the Towne where the Courte is kept, provided, they are freemen of the colony." [13]

This clearly provides for the choice of non-resident commissioners, but that is not the most surprising thing about the act. The possibility of a town having commissioners or representatives not chosen by the freemen of the town is one that we cannot imagine being tolerated by a Massachusetts or a Connecticut community.

The first assembly after the colony was reunited met in August, 1654.[14] It passed the following act on the constitution of its successors:

"We agree, that ye Generall Court of this Collonie or Generall Assemblie, to transact all affairs except election, as making of laws, tryall, of generall officers, etc., be held by six commissioners, chosen by each Towne of ye Collonie." [15]

Clearly there is here no restriction on the choice of non-residents as commissioners.

Prior to this date the records do not show a single instance of non-residence representation. For several of the

[13] R. I. Recs., I, 236. [14] *Ibid.*, I, 276. [15] *Ibid.*, I, 277.

years from 1647 to 1655 the names of the commissioners are grouped together without any reference to the towns from which they came. But the names of the towns appear often enough to enable us to find some instance of such representation if it had been practiced at all. On the other hand in the very first assembly which met after the passage of the above act, an assembly which met at Portsmouth in June, 1655, we find our first instance of non-residence representation. Half of Providence's committee were residents of Newport. From this time until the new charter of 1663, there are many cases of this, all of which will be given later. Reference has already been made to the power of the assembly to fill out a town's quota of commissioners. Two other phases of this appear in Rhode Island which differ from the practice in any other New England colony.

The assembly of August, 1659, met in Portsmouth. Its first item of business was to suspend Robert Westcott, a commissioner from Warwick, because of aid he had given New Plymouth in territorial claims against Rhode Island. Immediately after his removal we find this:

"It is ordered that one of the four (here follow the named of four Warwick citizens) shall be chosen by this Assembly, by votes, to serve as a commissioner in the roome of Robert Westcott. . . ." [16]

John Weekes was chosen.[17] This is in decided contrast to Massachusetts where in case a man was suspended from the general court his town was at once notified to choose a successor.

The first assembly under the charter of 1663 passed a law for filling vacancies among the deputies, as they had then come to be called. It was,

"That at the Court of Election, in case any one of the Deputyes should be chosen into the office of Governor, Deputy Governor or Assistants, that it should be lawfull for such officer, so left out, to serve in the roome of the deputy chosen for that present court." [18]

[16] R. I. Recs., I, 420. [17] *Ibid.*, I., 420. [18] *Ibid.*, II, 33-34.

How this worked out in practice is shown by an incident in 1666. At the court of election of that year there was a change of governors and also in several assistants. The assembly which convened immediately after the court of election ordered:

". . . that the Generall Sergant be sent unto Mr. Benedict Arnold, Mr. John Card, Mr. Edward Smythe and Mr. John Greene, that it being by law their liberty to sitt and act in this present assembly as Deputies, the Courte doe desire their assistance." [19]

Arnold had been governor and the others assistants, but all had lost their places at the election to men who had been returned as deputies. It was just such an occurrence as the law of 1663 was framed to meet.

In the records of the Rhode Island assembly in its early years we find reference to the strange fact that quite often the president of the colony was chosen moderator of the assembly while assistants were not infrequently chosen as deputies. This would be inexplicable if we did not keep in mind that in Rhode Island the legislative and executive functions were separate. The president and assistants by virtue of their office were not members of the court of commissioners.[20]

Treating the towns in alphabetical order we will now take up the cases of non-residence representation appearing before 1663.

Newport

In assembly of June, 1655, we find this item of business: "Captain Morris in y^{e} Roome of John Gould and William Lytherland in y^{e} roome of John Greene, both for Newport."[21] The names of Greene and Gould both appear as the duly elected commissioners for Newport but they evidently did not appear. Whether the vacancies were filled by the four commissioners of Newport who were present, as provided for by the law of 1651,[22] or whether the whole assembly supplied the vacancy as in the case of Robert Westcott, the record does

[19] R. I. Recs., II, 147-148.
[20] Osgood, 1, 358. Note.
[21] R. I. Records, I, 317.
[22] *Ibid.*, 1, 236.

not show. One provision, at least of the law of 1651, was not carried out. It provided that such vacancies should be filled from among the citizens of the town where the assembly was in session. This would mean that two citizens of Portsmouth, where the session was being held, would be chosen to fill the vacancies. Morris was a resident of Portsmouth[23] but Lytherland lived in Newport.[24]

The assembly of 1659 met at Portsmouth. One of Newport's commissioners to this was Captain Randall Houlden. He was a resident of Warwick[25] and a commissioner for Warwick for years.[26]

In the assembly of May, 1660, which also met at Portsmouth, William Harris of Providence, was one of Newport's commissioners. In the October session he appear for his own town.[27] It seems queer that Harris could have been elected to any office especially outside of his own town. He was the head of the Massachusetts faction in Rhode Island, and a few years before this Roger Williams had had him tried on the charge of high treason for the promulgation of the doctrine . . . "that he that can say it is his conscience ought not to yield subjection to any human order among men." [28]

In October, 1660, John Sweet of Warwick, where the assembly met, served as commissioner for Newport. He had had previous experience as commissioner for Warwick.[29]

Providence

Providence has the distinction of being the first Rhode Island town to use non-resident commissioners. She also employed them to a greater extent than her sister towns.

In assembly of June, 1655, which met at Portsmouth, half of Providence's commissioners were Newport men. They were William Dyre, James Barker, and Mathew West.[30] Barker again represented Providence in assembly of May, 1661, which met at Newport.[31]

[23] R. I. Recs., I, 300.
[24] *Ibid.*, I, 301.
[25] *Ibid.*, I, 302, 419.
[26] *Ibid.*, I, 241-508.
[27] *Ibid.*, I, 24, 299, 428, 431.
[28] *Ibid.*, I, 364.
[29] *Ibid.*, I, 272, 302, 432.
[30] *Ibid.*, I, 300, 301, 316.
[31] *Ibid.*, I, 437.

The assembly of March, 1656, met at Warwick. One of Providence's commissioners was Benedict Arnold. Arnold was one of the prominent men of the colony and had formerly been a resident of Providence,[32] but now lived in Newport.[33] He later represented Providence again in an assembly which met in Portsmouth in May, 1660.[34]

John Tripp of Portsmouth, and a commissioner for that town in several assemblies, represented Providence in an assembly which met in Portsmouth in October, 1656.[35]

In May, 1657, the assembly met in Newport. Providence chose a resident of that town, Henry Bull, as one of her commissioners. Bull had formerly been a commissioner for Newport.[36]

Providence did not have another non-resident commissioner until the assembly of May, 1660, which met at Portsmouth. In this it was represented by William Brenton,[37] president of the colony, and a resident of Portsmouth.[38] About this date he moved to Newport and later served several times as a commissioner for that town.

The assembly of August, 1661, met in Portsmouth. Again we find half of the commissioners for Providence were non-residents. They were: Joseph Toney of Newport, PhilipTabor of Portsmouth, and John Anthony, also of Portsmouth.[39]

Torrey had a long record as a commissioner for Providence. He represented that town in the following assemblies:

At Warwick in October, 1660.
At Portsmouth in August, 1661.
At Portsmouth in October, 1663.
At Newport in November, 1663.[40]

During the time covered by the above session he had also served his own town twice, in October, 1662, and in May, 1663.[41] With Torrey in October, 1663, Edward Thurston, also of Newport, served as a commissioner for Providence.[42]

[32] R. I. Recs., I, 14, 31, 327; Staples, 48.
[33] *Ibid.*, I, 300; Staples, 48.
[34] *Ibid.*, I, 428.
[35] *Ibid.*, I, 300, 304-501, 345.
[36] *Ibid.*, I, 87, 300, 304, 354.
[37] *Ibid.*, I, 427.
[38] *Ibid.*, I, 82, 109, 299.
[39] *Ibid.*, I, 300, 301, 447.
[40] *Ibid.*, I, 431, 447, 504, 508.
[41] *Ibid.*, I, 492, 501.
[42] *Ibid.*, I, 301, 504, 507.

The assembly of November, 1663, met at Newport to hear the new charter read which had just been brought by Captain George Baxter.[43] At such an important time as this Providence had two non-residents among her commissioners, Joseph Torrey, mentioned above, and Richard Tew, also of Newport.[44] Staples says these two men were elected by the other commissioners to replace Roger Williams and Stephen Arnold who had been elected by their townsmen but failed to attend.[45]

Portsmouth

In assembly of May, 1657, which met at Newport, Portsmouth was represented by two Newport citizens, John Greene and Edward Greemann.[46] This Greene should not be confused with the Greenes of Warwick. These were father and son and the names always appear as John, Jr., or John, Sr., in their frequent appearances as Warwick commissioners.

In an assembly of November, 1658, which met at Warwick, one of Portsmouth's commissioners was Benedict Arnold of Newport. After this Arnold served twice more in this capacity for Portsmouth; in assembly of May, 1659, at Providence; and one of October, 1660, at Warwick.[47]

The May assembly of 1659 met at Providence. In this Portsmouth had three non-resident commissioners: Benedict Arnold mentioned above, Roger Williams of Providence, and Joseph Clarke of Newport. Arnold and Clarke were both colony officials at this time, Arnold being president.[48]

Thomas Greene of Warwick, twice served as a commissioner for Portsmouth. First in assembly of May, 1662, which met at Warwick, and then in one of June, 1662, at the same town.[49]

Warwick

Warwick's first non-resident commissioner was Benedict Arnold of Newport,[50] a man who has the unique distinction of having represented every town in the colony. He was a

[43] R. I. Recs., I, 508.
[44] *Ibid.*, I, 301.
[45] Staples, 135.
[46] R. I. Recs., I, 301, 354.
[47] *Ibid.*, I, 300, 394, 408, 431.
[48] *Ibid.*, I, 299, 301, 407, 408.
[49] *Ibid.*, I, 302, 468, 480.
[50] *Ibid.*, I, 300.

commissioner for Warwick in an assembly which met at Portsmouth in May, 1656.[51]

In the fall session of 1656, which met at Portsmouth, John Sanford of Portsmouth, was one of Warwick's commissioners. Sanford was one of the most prominent men in the colony and served his home town in many asemblies as commissioner. At this time he was general recorder, treasurer, and clerk of the court of commissioners.[52] He is a good illustration of two practices common to all the colonies.

(a) Multiplication of offices in the hands of one man.
(b) Tendency on part of towns when choosing a non-resident representative to pick some prominent man, preferably a colony official.

Two of Warwick's commissioners in assembly of May, 1661, which met in Newport, were William Dyre and Peter Wallman. Both were residents of Newport and the latter was at this time solicitor general of the colony. He later appears as a commissioner for Portsmouth[53] but had evidently moved there.[54]

In assembly of August, 1661, half of Warwick's commissioners were non-residents. This assembly met at Portsmouth. The non-resident commissioners were John Porter of Portsmouth, Thomas Brownell of Portsmouth, and William Dyre of Newport.[55]

This brings us down to the time of the new charter. But before taking it up let us examine briefly a very curious custom regarding representatives in Rhode Island which is in marked distinction from the practice in other colonies. In this state a man could be a commissioner in the assembly and yet not be a freeman of the colony. That he be a freeman of a town was the only requirement.

"The path to the provincial suffrage lay through freemanship of the towns; he who had been accepted as an inhabitant of one of the towns and admitted as one of its freemen could hope, as a matter of course, to be granted the colonial freemanship. The charter of 1644, unlike that of 1663, did not

[51] R. I. Recs., I, 337.
[52] *Ibid.*, I, 52, 300, 336, 345, 326, 501.
[53] *Ibid.*, I, 301, 302, 437, 447, 468.
[54] Portsmouth Town Records, 97, 100.
[55] R. I. Recs., I, 300, 301, 447.

use the word freemen, but simply incorporated the "inhabitants" of the three towns. Yet the practice was to require a formal vote and admission to the town and then a similar entrance into the colonial freemanship." [56]

An example of the practice mentioned is Obadiah Holmes, who was a commissioner for Newport in March, 1656, but was not made a freeman of the colony until the Court of Election in May, 1656.[57] Edward Erman served as a commissioner for Providence in March, 1658, but was not admitted as a freeman of the colony until May, 1658.[58] That the same practice was followed after the new charter was obtained is shown by the following case: Nathaniel Waterman served as a deputy[59] for Providence in 1668. He was admitted as a freeman of the colony in 1670.[60]

The new charter which reached the colony in November, 1663, made several changes in the names of governmental agencies, which changes we shall follow hereafter. First, the name of the colony was changed to Rhode Island and Providence Plantations.[61] The name of the law-making body was changed to Gneneral Assembly; commissioner to deputy; and president to governor. These changes brought Rhode Island into similarity to the other New England states. The charter provided for a governor, deputy governor, and ten assistants, all of whom were named in it, and who were to continue in office until May, 1664, when the colony would have the privilege of electing whom it would to these offices.[62]

Provision was made for two annual sessions of the assembly, one on the first Wednesday in May, the other on the last Wednesday in October.[63] Instead of meeting in different towns of the colony all sessions were to he held at Newport. A change was made in the apportionment of deputies. Newport was still to have six, Providence, Portsmouth, and Warwick four each, while any other towns which might be

[56] McKinley, 440-441; R. I. Recs., I, 263, 280, 340, 387, 426.
[57] R. I. Recs., I, 326-327, 336.
[58] *Ibid.*, I, 336, 387.
[59] This term was used after charter of 1663 went into effect.
[60] R. I. Recs., I, 222, 364.
[61] *Ibid.*, II, 6. [62] *Ibid.*, II, 7, 8. [63] *Ibid.*, II, 8.

organized later were to have two each.[64] The deputies were to be

. . . "elected or deputed by the majour part of the ffreemen of the respective towns or places ffor which they shall bee so elected or deputed. . . ."

This contains no restriction limiting the choice to residents. The assembly had almost unlimited freedom in making laws, being restricted only that they

. . . "bee not contrary and repugnant unto, butt, as neare as may bee, agreeable to the lawes of this realme of England, considering the nature and constitutione of the place and people there. . . ." [65]

Rhode Island historians point out that that last qualifying phrase, which was also in the former charter, removed all limitations and restrictions on the assembly's legislative power.[66]

The first town to join the original four was Block Island in 1664.[67] Two deputies from it were in the Assembly of May, 1665. They must have been irregularly chosen, as a long act was passed "Concerning Block Island Deputies".[68] The gist of this was that since most of the inhabitants of Block Island had lived in other colonies and so were not familiar with Rhode Island rules; and since by admitting the two deputies they would learn the laws of the colony and thus be able to instruct those at home, they should be admitted to the assembly. Other towns followed from time to time, as Westerly, East Greenwich, Jamestown, and Kings Town, making a total of nine towns represented by the end of the century.

In all the colonies we have studied hitherto this expansion of settlements was always accompanied by an increase in the use of non-resident representatives. But such was not the case in Rhode Island. The records from 1663 to 1700 yield very few examples of this practice. Right here it might be noted that there was no assembly during the years 1687-89,

[64] R. I. Recs., II, 8.
[65] *Ibid.*, II, 8.
[66] Arnold, I, 293-294.
[67] R. I. Recs., II, 56-58.
[68] *Ibid.*, II, 121-122.

while the records for the assemblies of May, 1692, and for the years 1693, 1694, and 1695 are missing. The records for the other years are incomplete but show the following cases of non-resident representation.

Jamestown

Jamestown was represented in the assemblies of 1679-80-81 by John Fones (or Foanes),[69] a resident of Kingston,[70] and a holder of many prominent offices in the colony.

Portsmouth

There is not a clear case of Portsmouth having employed a non-resident as a deputy during this period.

In the assembly of May, 1683, one of her deputies was Thomas Greene.[71] Now Greene was a resident of Warwick and a deputy for Warwick in several assemblies. It is very probable that this is an error of the secretary, as five deputies are listed for Portsmouth and only three for Warwick. As four was the allotted number for each of these towns, and no more, Greene's name probably should have been listed under Warwick.

Providence

Providence furnishes the first example of non-residence representation under the charter of 1663. In October, 1672, Thomas Borden of Portsmouth,[72] was deputy for Providence.[73]

Providence was represented by Edward Smith of Newport, in May, 1675.[74] Smith was a former resident of Providence.[75] Ten years later, in 1685, Major John Coggeshall of Portsmouth[76] served as a deputy for Providence.[77]

Warwick

In assembly of May, 1680, Warwick was represented by Robert Burdick, who was a resident of Westerly and later represented Westerly.[78]

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[69] R. I. Recs., III, 29, 84, 89.
[70] Updike, I, 333.
[71] R. I. Recs., III, 121.
[72] *Ibid.*, I, 300.
[73] *Ibid.*, II, 465.
[74] *Ibid.*, II, 396, 527.
[75] Staples, 61.
[76] Records of the Town of Portsmouth, 163-174-177-212-228.
[77] R. I. Recs., III, 167.
[78] *Ibid.*, II, 388; III, 68, 84, 121, 167.

Westerly

In 1679 the deputy for Westerly was Joseph Jencks.[79] The records do not enable us absolutely to decide his place of residence but they point to Providence.

In assembly of 1680 both of Westerly's deputies were non-residents. They were Henry Tew and Edward Thurston, both of Newport. Tew was a military officer of the island while Thurston served as a deputy for his town in several assemblies.[80]

The difference in the number of instances of non-residence representation between the period preceding the charter of 1663 and that following it is very striking. This later period is also characterized by an indifference on the part of the towns in sending deputies to the assembly. From 1647 until 1663 there was not a single assembly at which all the towns were not represented. This may have been due to the assembly's power of filling a town's quota of deputies in case the full number did not appear.

To meet the conditions which arose after 1663 the colony at first used less stringent measures than did her sister colonies. The records of other colonies are full of cases where fines were levied against this town or that for failing to send deputies. Contrast with that method the following. In September, 1666, the deputies and assistants from Warwick did not appear at Newport so the assembly voted that a boat be procured and sent to Warwick

> . . . "to signify to the Magistrates and Deputyes of that towne, the Courts desire of their advice and assistance."

One of Newport's deputies was delegated for this mission and the whole expense was to be borne by the colony.[81]

Finally in 1672 a long act was passed levying a fine on assistants and deputies for non-attendance. One of the provisions of this was an oath[82] to be taken by all deputies.[83] This had never been required before and opposition developed against it. Providence protested that

[79] R. I. Recs., III, 29. [80] *Ibid.*, III, 84, 97, 121, 150, 332, 368. [81] R. I. Recs., II, 151.
[82] "Engagement" was the word used in Rhode Island. [83] R. I. Recs., II, 474.

. . . "it is contrary to the liberties granted to us in our charter. . . ." [84]

at the very next assembly Warwick's deputies refused to take the engagement.[85] The requirement for deputies to take an engagement was repealed in 1677.[86] It had led to much trouble and Warwick had been deprived of representation due to the refusal of its deputies to conform to the requirements.

We have seen that prior to 1663 the assembly or general court of commissioners as it was then called, met alternately in the four towns of the colony. The charter of 1663 designated Newport as the place of meeting. This continued to be the seat of the assembly until 1683 when it was voted to hold the fall session annually at one of the mainland towns, either Providence or Warwick. The next year provision was made that the fall session should alternate between Warwick and Providence.[87]

Until near the close of the century Rhode Island's legislature met in a single body. Agitation for division into two houses began as early as 1644. It was especially active in 1665; while in March, 1666, the division into two houses was made. But the assembly of September, 1666, voted to

. . . "sit together"

and to defer final action on question of separation until the October session. This session after

. . . "long and serious"

debate decided to make no change.[88] The division was finally made by the act of May 6, 1696.[89]

In discussing other colonies we have seen that the extension of settlements was accompanied by an increase in non-residence representation. In Connecticut to account for so little representation of this kind at a certain period we

[84] Staples, 155.
[85] R. I. Recs., II, 482.
[86] *Ibid.*, II, 584.
[87] *Ibid.*, III, 125, 161.
[88] *Ibid.*, II, 63, 124, 130, 131, 144, 145, 150, 151, 180.
[89] *Ibid.*, III, 313; Laws and Acts of R. I., 1636-1705, 39.

have offered as a reason the proximity of the towns to navigable water. In Rhode Island both of these hypotheses seem to fall down, for during the period of 1647-1663, when the settlements were proximate, and all on navigable water, there was by far a greater use of non-residence representatives than at any later period of the colony's history. Two things explain this very satisfactorily, however. First, the unusually large number of deputies, six allotted to each town, which naturally caused many vacancies, and secondly, the power of the assembly to fill these vacancies with residents of the town where the assembly was sitting.

As the century draws to a close the custom of employing non-residents as deputies was evidently disappearing, but no law appears on the statute books forbidding it.

In continuing this study into the eighteenth century actual cases of non-resident representation have been given only for the first ten years. This was a long enough period to show the practice which without doubt existed until there was a definite law on the subject. This practice was for the towns to choose a non-resident only in extreme cases, generally preferring one of their own citizens.

Kingston used two non-resident deputies during the first ten years of the eighteenth century, and each time she called on Westerly, queer as that seems, considering the geographical position of the two towns. In October, 1705, she was represented by Edward Larkin, who represented his home town the following year. In the May assembly of 1707, Kingston was represented by Christopher Champlin of Westerly. Champlin was a prominent man in the colony and had previously represented his home town.[90]

New Shoreham was the name under which the residents of Block Island became an integral part of the colony. In the assembly of October, 1705, they chose as their deputy Captain Nathaniel Niles, a resident of Kingston.[91] In this connection it is interesting to note that in October, 1705,

[90] Rhode Island Records, III, 68, 550, 564; IV, 3, 17, 224.

[91] *Ibid.*, III, 550; Updike, I, 435.

while Kingston went outside her boundaries for a deputy one of her own prominent citizens was chosen by a neighboring town.

Newport in 1701 chose as one of its deputies one of the prominent men of the colony, Major John Coggeshall of Portsmouth, whom we have already met as a deputy for Providence and who quite often represented his home town.[92]

Richard Green, of Warwick, a prominent man in Rhode Island affairs, represented Portsmouth in the Assembly of 1702.[93]

During this period of ten years Providence but once made use of a non-resident as deputy and that one time they chose an experienced legislator as was so often done by the towns making use of non-resident deputies. The man chosen to represent Providence in May, 1709, was James Brown, a resident of Newport. He had represented his home town in 1706-07-08, and did so again in September, 1709.[94]

The last instance of non-resident representation during this period was in 1709, when William Wilkinson, of Providence, represented Westerly[95] in the October session of the Assembly.

As has been said above, a checking of the lists of deputies through the first seventy or eighty years of the eighteenth century would, in all probability, show now and then a case of non-resident representation until the practice was declared unlawful.[96] Just when that was we cannot definitely state, but it was between the years 1772 and 1783. A careful search

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[92] R. I. Records, III, 185, 310, 428, 472. Recs. of Portsmouth, 163, 174, 212.

[93] *Ibid.*, III, 443, 473.

[94] *Ibid.*, III, 564; IV, 17, 47, 67, 69, 77.

[95] *Ibid.*, IV, 80, 128.

[96] It is interesting to note that in Rhode Island we have not found a single instance of a deputy representing two towns at the same time as sometimes happened in Connecticut and Massachusetts. In this connection the following may be of interest:

"Whereas this Assembly at the last session empowered such Inhabitants of the Town of Newport, as were Freemen thereof at the time it was taken Possession of by the Enemy, to meet at Providence, on the sixteenth instant, and choose Deputies to represent the said Town; who accordingly met, and among others chose Paul Mumford, Esq., who having purchased an Estate in Barrington, and removed there with his family, is also elected a Deputy for the said Town of Barrington; whereby a Vacancy is made in the Deputies of Newport; It is therefore Voted and Resolved, That such Inhabitants of the said Town of Newport as were Freemen thereof at the Time it was taken Possession of as aforesaid, consisting of a number of not less than Seven, be empowered to meet together, at the State-House in Providence, on Tuesday the Sixth Day of May next, at Five o'clock in the afternoon to choose another Person in the Room of the said Paul Mumford."

Reprints of R. I. Acts and Resolves—April, 1777, 5.

through all the Colonial Records and Digests of Colonial Law[97] fails to reveal the exact statute which established a residential qualification for deputies in the General Assembly. The dates given between which the requirement became operative were arrived at in the following manner:

During the eighteenth century Rhode Island issued eight volumes (digests) of colonial law. The dates of these were 1705, 1719, 1730, 1744, 1752, 1767, 1772, and 1798. In the first six the law on the subject of representation is practically the same. In the digest for 1767 we find

"An Act, regulating the Manner of admitting Freemen, and directing the Method of electing Officers, in the Colony."

The portion of the act bearing directly on qualifications for deputies reads,

"And be it further Enacted by the Authority aforesaid, That no Person shall be elected to the place of a Deputy, to sit in the General Assembly of this Colony, but such as are Freeholders[98] therein, and Freeman of the same, and that each respective Town shall elect their Number of Deputies, as stated in the Charter, at the aforesaid Town-Meetings in April and August." [99]

There is certainly nothing in the above law limiting the towns to the choice of a resident as deputy.

The digest published in 1772 has the following title page:

"Acts and Laws of the English Colony of Rhode Island and Providence—Plantations. In New England in America; Made and Passed since the Revision in June, 1767".

[97] "In considering the nature of these Digests, it must not be forgotten that they represent only to a small extent the laws governing the Colony. The statutes of England were the real laws here from the beginning until 1744; from that time only certain of the statutes of England were in force."

Introduction to Digest of Rhode Island Colonial Laws of 1719, 11.

[98] A freehold qualification first appeared in 1724. It was changed from time to time, the amount required differing. At the time of the above quotation (1767), the exact requirement was:

"And be it further enacted by the Authority aforesaid, that no Person whosoever shall be permitted to vote, or act as a Freeman in any Town-Meeting in this Colony, but such only who are inhabitants therein, and who, at the Time of such their voting and acting, are really and truly possessed, in their own proper Right, of a Real Estate, within this Colony, to the full value of Forty Pounds, or which shall rent for Forty Shillings per annum, being an Estate of Fee-simple, Fee-tail or an estate in Reversion, which qualifies no other Person to be a Freeman, or at least an Estate for a Person's own Life, or the eldest son of such a Freeholder. And that no Estate of a less Quality shall entitle any Person to the Freedom of the Colony."

Acts & Laws of R. I., 1767, 78.

[99] Acts and Laws of R. I., 1767, 86.

This volume contains no law on representation, so it is fair to assume that the law quoted from the digest of 1767 was still in force.

In 1783,[100] however, the following law was passed regarding the representation of New Shoreham (Block Island):

"Be it enacted by the General Assembly and by the authority thereof it is enacted, That the freemen of said town of New Shoreham, when legally convened in town meeting for choice of Representatives to the General Assembly, be and they are hereby authorized and empowered to choose any person, being a freeman of any town of the state, who is seized, in his own right, of a freehold estate in the said town of New Shoreham, to represent them in the General Assembly. Provided, nevertheless, That such person, so elected be not allowed to act or vote as a freeman of the town of his residence, during the time he shall represent the said town of New Shoreham as a Deputy; and that this act shall not be brought into precedent by any other town in this State." [101]

The law just given evidently arose out of a concrete case affecting New Shoreham which came before the Assembly in June, 1783. What this was we can see from the following:

"Whereas from the insular Situation of the Town of New Shoreham, it will often be impracticable for the Deputies of the said Town, who reside therein, to attend this Assembly: And whereas the Freemen of the said Town, influenced by the aforesaid Consideration, have made choice of Ray Sands, Esq., an Inhabitant of the Town of South-Kingston, who is seized of a freehold Estate in the said Town of New Shoreham, to represent them in Generall Assembly; It is therefore Voted and Resolved, That the choice of the said Ray Sands as aforesaid be and the same is hereby approved, and that the Freemen of the said Town of New Shoreham be and they are hereby empowered to choose any Person, being a Freeman of any Town in the State, who is seized in his own right of a Freehold Estate in the said Town of New Shoreham to represent them in General Assembly; any Law, Custom or Usage, to the contrary notwithstanding; Provided, nevertheless, That such Person so elected be not allowed to act or vote as a Freeman of the Town of his Residence, during the Time

[100] This is a marginal date which appears beside this law in the Digest of 1798.

[101] The Public Laws of R. I., 1798, 89-90.

he shall represent the said Town of New Shoreham as a Deputy; and that this Resolution shall not be brought into Precedent by any other Town in this State." [102]

It is quite evident from the above that by 1783 the practice of choosing only residents as deputies had come to be recognized to such an extent that any variation from it required the consent of the General Assembly.

The first definite law demanding a residential qualification for deputies to the General Assembly appears in the Digest of 1798. But it bears no date of passage, so for the reasons given above we have stated that such a requirement became operative some time between 1772 and 1783. In the Digest of 1798, is a long act entitled:

"An Act regulating the Manner of Admitting Freemen, and directing the Method of electing Officers in this State."

Section fifteen of this act reads:

"And be it further enacted, That no person shall be elected to the place of a Representative to sit in the General Assembly of this State, unless he be a freeholder of the town for which he shall be elected and a freeman and inhabitant of the same; having and excepting the provision made by law for New Shoreham. . . ." [103]

To bring our study of Rhode Island to a close it is only necessary for us to examine the repeal of the exception made in the requirement of residence representation in the case of New Shoreham. The record of this repeal is brief. In a volume of Rhode Island Public Laws, published in 1810, the following occurs under date of 1804:

"An Act to repeal an Act, entitled 'An Act regulating the choosing of Representatives to represent the Town of New Shoreham in the General Assembly of this State'." [104]

This is all that appears, but with its passage non-residence representation came to an end in Rhode Island in 1804.

[102] Reprints of R. I. Acts and Resolves, June, 1783, 3.
[103] The Public Laws of R. I., 1798, 123-124.
[104] *Ibid.*, 1810, 67.

CONNECTICUT

FROM the very beginning of the Connecticut settlement Hartford was the political center. A general court met here on May 1, 1637, composed of magistrates and deputies from the three towns whose inhabitants had emigrated from Massachusetts. Each town sent two magistrates and three deputies. Each town's deputation was called its committee.[1]

From this date until 1639 whatever constitutional authority the Connecticut government had it drew from Massachusetts through its relation to that colony, it having been governed for its first year by commissioners appointed by the general court of Massachusetts. It is probable that these commissioners, at the end of their official term of office, summoned the general court of May 1, 1637.[2]

The Fundamental Orders were adopted at Hartford on June 14, 1639. The body by which this was done was probably a convention of all the freemen of the colony. This was Connecticut's constitution until the royal charter of April 23, 1662.

By the Fundamental Orders two annual sessions of the general court were provided. Each of the three original towns[3] was to send four deputies, and any towns that might be added later were to be granted such number of deputies as the general court thought proper in proportion to the number of inhabitants.[4]

The spring session of the general court was like the May session of the Massachusetts court in that it was a court of election. By the Fundamental Orders this was to be held on the second Thursday in April. But this date proving inconvenient, it was changed, in 1646, to the third Thursday in May. This session was attended by all the freemen of the colony for the purpose of choosing the governor, deputy governor, and at least six assistants. From the very beginning Con-

[1] Conn. Col. Recs., I, 1-9.
[2] Osgood, I, 305.
[3] Hartford, Weatherfield, Windsor.
[4] Conn. Recs., I, 24.

necticut used the ballot and a system of nominations. All voting at the court of election was by ballot. Persons for whom votes were cast were nominated by the secretary, who could only nominate some one proposed in a previous general court.[5]

The governor was simply the presiding officer of the general court, which in Connecticut did not divide into two Houses until October 13, 1698.[6] The functions of the general court were administrative, legislative, and judicial. For a legal session there had to be present at least four assistants in addition to the governor and a majority of the deputies.[7] However, in 1661, the "river towns" obtained a modification of this rule. In an act of October third of that year the towns were requested to reduce their representation by half because of the growing expense of the general court. In addition it was provided that in case a general court had to be called at a time inconvenient for outlying towns, it should have power to act with less than a majority of the deputies in attendance, provided that some were present from the river towns and there were present also the requisite number of magistrates.[8]

The Fundamental Orders contained a unique provision by which the general court could be called in session by the freemen against the opposition of the colony officials. Under such circumstances the majority of the freemen could order the constables of the several towns to call a meeting of the general court. Then after choosing a Moderator they were in legal session.[9]

The royal charter of April 23, 1662, gave Connecticut the constitution which was to last it through its colonial period and well into its history as a state. This provided for a representative assembly much like that already in existence, although the charter used the words General Assembly.[10] It provided for two regular meetings, second Thursday in May

[5] Conn. Col. Recs., I, 21, 22, 140.
[6] *Ibid.*, IV, 267, 282.
[7] *Ibid.*, I, 24.
[8] *Ibid.*, I, 372.
[9] *Ibid.*, I, 23. Due to the death of the governor and the absence of the deputy governor there was a case of this kind in 1653 (Conn. Recs., I, 252).
[10] "General Court" is used in the colony records until the division into two houses October, 1698 (Records IV, 282).

and second Thursday in October, Other sessions could be called by the governor. The number of deputies each town could send was limited to two,

". . . not exceeding twoe Persons from each place, Towne or Citty, whoe shall bee from tyme to tyme thereunto Elected or Deputed by the major parte of the freemen of the respective townes, Cittyes and Places for which they shall bee soe elected or Deputed, etc." [11]

Nothing in the above could be construed to restrict representatives to residents of the towns sending deputies, so Connecticut followed the common English practice of the time. It is impossible, however, to check any actual instances of non-resident representation prior to Court of Elections of May, 1670; for in the record before that date the names of the deputies only are given and not the names of the towns which they represented.

Taking in alphabetical order the towns which show instances of non-resident representation we have the following:

Branford was prepresented in the May court of 1693 by William Ely,[12] a resident of Lyme, and a deputy of Lyme,[13] for years in the general court.[14]

Fairfield was represented in May Court of 1684, by John Burr, a resident, and John Taylor[15] of Windsor.[16]

Farmington was represented in General Court of October, 1693, by Ensign Thomas Judd of Waterbury. He, at the same time, was deputy for his own town. The same thing was the case in Court of Elections in 1700, only here Judd's name appears as Lieutenant.[17] He was a deputy from his own town almost constantly from 1684-1705.[18]

Greenwich made greater use of non-residents as deputies

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[11] Conn. Recs., II, 5. [12] *Ibid.*, IV, 92. [13] *Ibid.*, IV, 3-532.

[14] The Editor of the Connecticut records thinks that this is an error of the colony secretary and that Eleazer Stent's name should be substituted as Branford's deputy. While this is possible such an error hardly seems probable. The only thing favoring such a view is the fact that Stent represented Branford for years. There was, in the records of the time, much carelessness in the use of proper names.

[15] Conn. Recs., III, 139.

[16] *Ibid.*, II, 223: Stiles, History of Windsor, 126, 224, 228, 352. This name furnishes an illustration of note 4 on Page 52. In Connecticut records this name appears as Tyler, in Schenck's History of Fairfield as Tyler, but in Stiles' history as Taylor.

[17] *Ibid.*, IV, 104, 105, 150, 318, 319.

[18] *Ibid.*, IV, 3-521.

than perhaps any other Connecticut town. One man who often represented it as well as other towns in which he did not reside was John Banks, a lawyer of Fairfield.[19] This shows the special prestige of lawyers in the legislative field which we have to-day, had its beginning even at this early date. Banks represented Greenwich in October, 1673; Court of Elections, 1677; October, 1677, and October, 1678.[20] In all the above cases Banks was at the same time a deputy from his home town, while in October, 1677, he represented the three towns of Greenwich, Fairfield, and Rye.[21] In the last three Courts mentioned above Banks had associated with him as Fairfield's other deputy William Pitkin of Hartford,[22] who was deputy for Hartford at the same time he was serving for Fairfield.[23]

These two men, Banks and Pitkin, furnish more examples of "double" representation than can be found in the whole legislative history of Massachusetts up to the abolishment of non-residence representation in 1693. Massachusetts shows no case of a man representing three towns as Banks did in 1677. It is interesting to speculate whether in cases like this a deputy would have three votes on any measure before the General Court. The records are silent on the subject but it seems very probable that such was the case.

In October Court of 1683 the deputy for Greenwich was Joseph Theale.[24] He was a resident of Stamford and had represented his home town quite often.[25]

Haddam had as its deputy in the General Court of October, 1673, John Gilbert.[26] Gilbert, though a non-commissioned officer in the militia, was quite an important personage in military affairs, having been employed as messenger for the colony on several long journeys. He lived in New Haven.[27]

Lyme furnishes three instances of non-resident representation. In October, 1676, its deputy was Joseph Peck,[28]

[19] Conn. Recs., II, 521; Schenck, History of Fairfield, I, 351.
[20] *Ibid.*, II, 209, 300, 318; III, 16.
[21] *Ibid.*, II, 300.
[22] *Ibid.*, II, 518.
[23] *Ibid.*, II, 300, 318; III, 16, 17.
[24] *Ibid.*, III, 121.
[25] Huntington, History of Stamford, 63.
[26] Conn. Recs., II, 209.
[27] *Ibid.*, II, 524.
[28] *Ibid.*, II, 286.

a resident of New Haven.[29] In June, 1692, and May, 1693, it was represented by Isaac Bronson.[30] Bronson was a resident of Waterbury, being one of the patentees of that place.[31] He later represented his home town.[32]

Middletown is one of the towns from which, because of its proximity to the seat of government, we should not expect to find any examples of non-residence representation. But we have two examples here. In October, 1676, one of its deputies was John Graves. In this same session Graves represented his home town, Guilford.[33] Graves is a good example of what was plainly a practice in Connecticut during the seventeenth century, that is, the long continuation in office of a deputy who had proved himself able and worthy. Graves represented his town at no less than twenty-eight sessions of the General Court.[34]

In the October session of 1696, one of the deputies for Middletown was John Hall, who at the same time represented his town of Wallingford. Prior to this he had been Wallingford's deputy and later represented both it and Middletown in several sessions.[35] A causal glance at the Records might seem to indicate that this name, John Hall, might be that of two different men. The name was a common one, occurring often in the records, which makes it hard to trace. Middletown had had a John Hall, but he died before this date, on January 22, 1695.[36] The Wallingford Hall lived until 1721.[37]

Preston, in May, 1693, September, 1693, and October, 1694, was represented by Lieut. John Morgan.[38] Morgan was a resident of New London and had been a deputy for that town in two sessions of the court in 1690.[39] In May, 1693, Preston was also represented by Captain Benjamin Brewster, who was a resident of Norwich[40] and was a deputy for that town almost continuously from 1689-1697.[41] Another Nor-

[29] Conn. Recs., II, 87, 524.
[30] *Ibid.*, IV, 75, 92.
[31] Bronson, History of Waterbury, 140.
[32] Conn. Recs., IV, 197, 359.
[33] *Ibid.*, II, 287, 525.
[34] *Ibid.*, II, 126-286; III, 16-155.
[35] *Ibid.*, IV, 174, 197, 283, 319, 327, 343, 481, 498.
[36] Adams, Middletown Upper Houses, 572-574.
[37] Davis, History of Wallingford, 750-751.
[38] Conn. Recs., IV, 91, 102, 130.
[39] *Ibid.*, IV, 15, 23, 93.
[40] *Ibid.*, IV, 69, 93.
[41] *Ibid.*, IV, 3-197.

wich citizen who acted as deputy for Preston was John Tracy. This was in May, 1695. Tracy had had previous legislative experience as a deputy from his home town.[42]

Rye, a town in the extreme western part of the colony, employed John Banks, whom we have met already, extensively as its deputy. In fact, he is the only non-resident that ever represented the town. Between the years of 1670-1680 he was Rye's deputy in eight sessions of the general court, five of these being courts of elections.[43] Rye was in Connecticut until 1683, when by terms of an agreement between the agents of the two colonies, regarding the boundary, a new line was run which placed Rye in New York. Upon petition of Rye and Bedford in 1696, they were received back into the colony of Connecticut, but by an order of king in Council of May 27, 1700, they were put back under the jurisdiction of New York.[44]

Stonington was represented in October Court of 1675 by John Gilbert of New Haven. We have already had an instance of his serving for Haddam.[45] In October Court of 1686, Stonington was represented by James Avery[46] of New London. Avery was also a deputy for his home town in this court and served it in that capacity for many sessions between the years 1665-1689.[47] In May of 1692,[48] Isaac Wheeler of Fairfield[49] was deputy for Stonington.

Stratford was represented by John Wells in September, 1689, and October, 1693. In the meantime he had represented New Haven at a Special General Court held February 21, 1693.[50] The colony records give no clue as to his place of residence but the name was a common one in Stratford[51], so that was probably his home.

Waterbury had as one of its deputies in the general court of 1690 and again in 1693, Lieutenant John Staley. He was a

[42] Conn. Recs., IV, 130, 138.
[43] *Ibid.*, II, 127, 147, 170, 180, 184, 318; III, 2, 48.
[44] *Ibid.*, II, 15; IV, 191-192, 328.
[45] *Ibid.*, II, 265, 524. Jonathan Gilbert who represented Hartford in 1677 is a different Gilbert. He lived in Hartford (Recs. II, 518).
[46] *Ibid.*, III, 44.
[47] *Ibid.*, III, 2-253.
[48] *Ibid.*, IV, 66.
[49] Schenck, History of Fairfield, 274, *et seq.*
[50] Conn. Recs., IV, 2, 87, 104.
[51] See Orcutt, History of Stratford.

prominent citizen of Farmington and represented Farmington in both of the above years as well as at many other times. In the records for the court of 1690 we find the name appearing once as Lieutenant Stanley and again as Captain Stanley, which might lead to the supposition that two different men were meant. But Stanley was not made a captain until May, 1691,[52] so evidently the different titles were employed because the same man appeared as deputy for two towns.

A study of the data for Connecticut shows several contrasts to the situation in Massachusetts.

First, non-residence representation in Connecticut was evidently increasing in the latter years of the seventeenth century. This was probably due to the fact that new inland towns were springing up. Nearly all the towns of the colony up to the year 1680 were either on or near navigable water.

Secondly, on the whole there was less non-residence representation in Connecticut than in Massachusetts. The more compact colony, central location of the capital and the factor of navigable streams, already mentioned, all had a part, without doubt, in producing this result.

The end of the century brought no change in the law or custom governing representation. As the century drew to its close, it witnessed, however, a radical change in the organization of the general court. On October 13, 1698, the court divided into two bodies called the Upper and the Lower House.[53] Each was to have the rights and privileges common to bicarmeal legislatures of the time.

To give all the examples of non-residence representation throughout the eighteenth century would be both tedious and unnecessary. Let it suffice to say that the practice was not changed. Connecticut was not inclined to change her political customs, in fact boasted of their stability; and this one particular custom lasted well on into the period of her statehood. We have no Journal of the Proceedings of the General Assembly after 1780 until comparatively recent times; but a brief glance at that of the last few years before 1780 will still

[52] Conn. Recs., IV, 23, 47, 92.

[53] *Ibid.*, IV, 267, 282.

show the custom operative though evidently the towns did not often avail themselves of it.

Ephraim Hubbell of New Fairfield represented his own town in January, 1769, and May, 1771; but Kent in May and October, 1769, and October, 1771.[54] At a still later date he served many sessions for each of the above places.[55] Josiah Phelps of Windsor[56] represented either his own town or Harwington at every session of the General Assembly from 1769 to 1777,[57] while at the following sessions he represented them both at the same time: May, 1771, May, 1773, May, 1775, and July, 1775.[58]

John Brooks of Stratford was the representative of his own town in May, 1773, but represented Haddam in October, 1773, and many times thereafter.[59]

Major Ebenezer Say of Sharon after serving his own town as representative for several sessions, acted in the same capacity for Stafford in 1777-1778.[60]

One Aaron Austin often represented New Hartford and was probably a resident of that place, although the records are not definite concerning it. But in the Assembly of May, 1778, he represented both New Hartford and Torrington.[61]

The last instance in point of time that we can give is that of Increase Mosely, who represented both Woodbury and Washington in the Assembly of May, 1779.[62] His place of residence cannot be definitely established.

So much for the practice. Now let us see what the later Connecticut law said on the matter. We have already seen that under the charter of 1662 no check was placed on non-residence representation. The next legal reference to a qualification for deputies was in 1750, when the laws of the colony were revised. This reads:

"And that the Freemen in every Town in this State, shall have Liberty to send one or two Deputies to every session of

[54] Conn. Recs., XIII, 123, 170, 235, 408, 414, 512.
[55] *Ibid.*, XIV and XV.
[56] *Ibid.*, XIII, 413, 415; XIV, 71, 72; XV, 2, 4, 90, 92.
[57] *Ibid.*, XIV, 33, 72, 159, 213, 252, 353.
[58] Public Records of the State of Conn., I, 3, 62, 90, 408, 410, 469, 473, 522.
[59] *Ibid.*, XIV, 228.
[60] *Ibid.*, XIV and XV.
[61] *Ibid.*, II, 3.
[62] *Ibid.*, II, 250.

the General Assembly. . . . And that no person shall be accepted a Deputy in the General Court, that is not known to be a Freeman of this state, and regularly chosen thereunto by the Freemen of that town for whom he serves. . . ."

Exactly this same wording is kept in a publication of the laws of the colony and state of 1786, 1796, and 1808.[63]

Before this last publication of laws was made the agitation had started which was to give Connecticut a new constitution, and incidentally place a residential qualification on representatives in the state legislature. Hollister says that

. . . "as early as 1800 petitions began to be circulated through the state asking for the choice of members of the council and representatives in Congress by districts.[64] The demand for a new constitution was fought out along party lines, the Democrats demanding it and the Federalists saying 'let well enough alone'."

So pressing were some of the wrongs, real or fancied, which existed under the old charter that the fight centered around them, and such questions as the one in which we are especially interested were overshadowed.

The contest lasted twenty years, growing more and more bitter. This was partially due to the religious question being pushed to the front as the dissenting sects gradually increased in number. Their part in it is clear when we remember that Connecticut had an established church, for the support of which everyone was taxed unless he could show that he was a member of some other denomination. How the members of the established order viewed the new movement we can see from the pen of one of their ablest ministers and one, by the way, who afterwards saw that he had been on the wrong side and was willing to admit it.

"The ambitious minority early began to make use of the minor sects on the grounds of invidious distinctions, thus making them restive. So the democracy, as it rose, included nearly all the minor sects, besides the Sabbath breakers, rum-

[63] Acts and Laws of Conn. (1786), p. 28 (1796), p. 126. The Public Statute Laws of the State of Conn. (1808), note 18, p. 203; note 21, p. 204.

[64] Hollister, History of Conn., II, 512.

selling, tippling folks, infidels, and ruff-scuff generally, and made a dead set at us of the standing order." [65]

It is a little difficult for us at this distance to realize just how bitter such a conflict could become. The following will illustrate. On August 29, 1804, the Republicans held a convention in New Haven, the sole object of which was to demand a new constitution. Every justice of the peace who attended that convention was impeached and tried by the next general assembly.[66]

In an attempt to dissipate the rising storm the assembly in 1810 offered to divide among certain denominations a portion of the sum received from the United States for the state's Revolutionary expenses. But the Baptists and Methodists refused their share and the offer only added fuel to the flames.

Year by year the Democrats gained headway until in 1817 the victory came. A coalition was formed of all the disaffected interests, and the party adopted Toleration as both its name and its motto.

In the election of this year the Toleration party fought not only for a new constitution but also for the repeal of the "Stand Up Law", requiring open voting. They argued that publicity intimidated men from voting as they wished; for their creditors and those to whom they were under obligation knew how they voted. When this subject was under discussion in the October session of the assembly, a Mr. M'Clellan, speaking for a continuance of the old method, said in part:

. . . It is said that men will not dare to stand up and let it be known who they vote for—and pray what is it if a freeman in Woodstock is to vote for a man in Fairfield County? Such is the independence of freemen, that not one would be unduly affected by declaring his choice." [67]

The nominee for governor of the Toleration party was Oliver Wolcott, a member of one of Connecticut's oldest families. He had, however, resided in Washington and New

[65] Lyman Beecher, Autobiography, I, 342.
[66] Hollister, II, 512.
[67] Connecticut Courant, Nov. 4, 1817.

York for a long time, and in the eyes of his political opponents this had had a bad effect on him. One said that by his absence,

". . . He had unfortunately lost all the peculiar habits and manners of a citizen of Connecticut, and forgotten the policy of his ancestors."[68]

Nor were all the attacks on Wolcott of this mild character. It was openly and persistently charged throughout the campaign that he had burned the War and Treasury building at Washington, while Secretary of the Treasury, in order to cover up his embezzlement of public money.

The Federalist nominees were John Cotton Smith for governor and Jonathan Ingersoll for lieutenant-governor. These two were also representatives of two illustrious Connecticut families. The feeling of these men and their supporters cannot be better stated than by the following address to the Freemen of Connecticut, published in the Courant, March 4, 1817.

"At an early period of this country our ancestors made for themselves a constitution and form of government which has continued, with little variation for almost two centuries, and has the advantage of experience, which gives stability of a government. The administration has been such as to secure to the people civil and religious liberty to as great an extent as has fallen to the lot of any portion of the human race. Provision for the distribution of justice, and the support of schools, literary and religious institutions, secured to all, their civil rights, the benefits of education, and the enjoyment of religion, with the most perfect freedom as to the rights of conscience. A government, from which its citizens have derived such important advantages, has deservedly possessed their confidence and support, and has thereby been enabled to exist unimpaired, even under revolutionary convulsions.

"Members of the legislature and the officers of the government of this state, were, till of late years, uniformly elected by the freemen, uninfluenced by political parties.

"Unfortunately a party has been organized in this state, who deny that we have any constitution, and claim that our government is a usurpation; who have been, and are now

[68] Connecticut Courant, March 18, 1817.

pursuing, with indefatigable and persevering industry, every measure in their power to undermine and overturn, or to effect a change in our state government. To attain their object . . . they have even pressed into their service the cause of religion, and have endeavored to excite discontent and dissatisfaction among particular denominations of Christians, and to impress them with a belief that they are treated with intolerance.

"Connecticut has hitherto resisted all the attacks that have been made on her constitution and government. Her course has been honorable to her freemen, we feel an honest pride in a review of it. To enable us to preserve and hand down to posterity unimpaired, this fair inheritance, which we have derived from our forefathers, nothing is wanting but a faithful discharge of the important duties which devolve on every freeman. . . ."

In the campaign speeches the statement was often made by the Federalists that

. . . "Connecticut is the oldest government in Christendom,"

and the aim of their opponents was spoken of as "Overturning the government of the state and "Revolution". Some even went so far as to suggest that divine vengeance would be meted out to innovators.

"To attempt to disturb the generall order and peace of this little state is to war against the best tempered good that heaven bestows on man. . . . It is ingratitude. . . . It is impiety and if you persist and throw the state into the hands of irreligious and unprincipled men you will meet with the frowns of a righteous providence." [69]

Election date was April 17, 1817. Wolcott was elected and with him an assembly a majority of whom were favorable to a new constitution. The Federalist press at once began to picture the evils that would result.

"Instead, then, of our present truly popular and republican system, we must expect one more aristocratic, and more nearly conformed to the monarchial plan—that is, a governor to form a distinct independent branch of the legislature, a senate, probably like many of the professed republican states, for

[69] A letter signed Senex—Conn. Courant, August 19, 1817.

three or four years the state divided into districts, and each district to become, of course, the theatre of demagogues." [70]

In May, 1818, the legislature authorized the calling of a constitutional convention. It met August 20th, and soon completed its work. The people of the state then voted on the new constitution, October 5, 1818, giving it a majority of 1,554 out of a total vote of 26,282. When the constitutional convention met a committee was appointed to draft a constitution for the consideration of the convention. Art. III, Sec. III, of this draft reads:

"The house of representatives shall consist of electors, residing in town from which they are elected." [71]

This change in custom a century and a half old in Connecticut evidently aroused no opposition, for we read in the Journal:

"The Third Article, relating to the Legislative Department, was then read and considered by sections, and after an amendment, varying the style only, was approved." [72]

[70] Conn. Courant, September 2, 1817.

[71] Journal, p. 79.

[72] *Ibid.*, p. 22. An attempt was made to district Senators also (Journal, p. 29) but was unsuccessful. They were elected at large until 1828. (Amendments, Art. II and III.)

NEW HAVEN

It should be kept in mind that for the first few years of its existence New Haven colony and town were one. It was founded by the little company of Puritans which followed Davenport and Eaton from England and politically was entirely independent of any colony already established.

The first political meeting, of which we have record, held in the colony, was the famous gathering in Newman's barn, June 4, 1639. At this it was decided that the Bible was the sole and sufficient guide in affairs of government as well as in private matters. Davenport presented the query which was affirmed by open vote,

"Whether the Scripturs doe holde forth a perfect rule for the direction and government of all men in all duties which they are to performe to God and men as well in the government of famylyes and commonwealths as in the matters of the church." [1]

The political body here formed consisted only of church members.

"All having spoken . . . it was agreed upon . . . as on order whereunto every one that hereafter should be admitted here as planters should submitt and testefie the same by subscribeing their names to the order, namely, that church members only shall be free burgesses, and that they onely shall chuse magistrates and officers among themselves." [2]

The governing body of the colony from the date of the signing of this agreement, June 4, 1639, to October 25, 1639, was seven magistrates or "seven pillars" of the church. The body of freemen assembled chose twelve men fit for this office and from this body of twelve seven were chosen by lot. The seven magistrates voluntarily resigned their places on October 25, 1639, and the whole body of freemen elected a magistrate and four deputies to manage the public affairs of

[1] New Haven Records, I, 12.
[2] *Ibid.*, I, 15.

the plantation.[3] It was also decided that these officers were to be elected yearly at a general court to be held in the last week of October.[4]

New Haven's only title to the land she occupied was by purchase from the Indians in 1638. In 1640 further purchase was made both on the mainland and on Long Island. It was on these later purchases that the towns of Stamford, Branford, and Southold were established. The first two by seceders from the church and town of Weathersfield; the latter by a company of folk directly from England. In all these sales New Haven stipulated that the new towns were to look to her as the political center of the colony. Just what this political connection was to be seems quite indefinite, as can be seen from the agreement with Stamford which reads:

". . . Thirdly, that they join in all points with this plantation in the form of government here settled." [5]

The formation of a united government, politically and territorially, was directly due to New Haven entering the New England Confederacy in 1643. She had had two commissioners present at the meeting at Boston at which the articles of union were drafted and signed. After their return a general court was convened at New Haven, October 27, 1643, in which for the first time the outlying towns were represented. The towns met on a basis of equality, Milford, Guilford, and Stamford each sending two deputies.[6] The form of government adopted[7] was similar to that existing in the neighboring colonies with the exception of the requirement of church membership for freemen. It provided for a general court of governor, deputy governor, magistrates, and two deputies for each town. All were to sit as one body. The court was to meet in two

[3] New Haven Records, I, 20-21. The word plantation is commonly used in the Records in speaking of a town's local affairs. In contradistinction to this the word "jurisdiction" was used in referring to a strictly colonial matter involving the united interest of several towns.

[4] *Ibid.*, I, 21.

[5] Atwater, History of the Colony of New Haven, 175.

[6] It should be borne in mind that prior to this Milford and Guilford had been politically independent of New Haven. Fairfield from its settlement belonged to Connecticut and thus kept New Haven from being a territorial unit.

[7] New Haven Records, I, 112-115.

annual sessions, April and October, the latter being the court of election. All freemen could vote for governor and magistrates, and as in the other colonies there was a proxy arrangement by which those could vote who could not attend the court of election.

The provision regarding deputies reads that there shall be

. . . "two Deputyes for every plantation in the Jurisdiction, which Deputyes shall from time to time be chosen against the approach of any such Generall Court by the aforesaid free burgesses. . . ." [8]

While this certainly did not limit the freemen's choice to their fellow citizens yet the records show not a single case of non-residence representation.[9] The reason for this probably lies in the accessibility of New Haven from each town either by land or water.[10]

New Haven shows a remarkable continuity of service on the part of its deputies. Every town kept practically an unbroken delegation in the general court from 1653 to 1662, when factions in certain towns declared their allegiance to Connecticut. The last general court of the colony met on December 13, 1664.[11] It was a primary as well as a representative assembly. After long and careful consideration of the claims of the Duke of York on the west and of the dangers to all the colonies attending the visit of the royal commissioners the colony yielded to the demands of Connecticut and became a part of that government.

[8] New Haven Records, I, 14.

[9] There are no records for the colony of New Haven from 1644 to 1653 except for a Court of Magistrates in 1646 and for a Court of Election in October, 1646. (New Haven Records, II, IV). But from 1653 until New Haven's absorption by Connecticut they are complete.

[10] The towns represented in the later days of the colony were: New Haven, Guilford, Milford, Stamford, Branford and Southold.

[11] New Haven Records, II, 549.

NEW YORK

DURING the Dutch rule in New York there was no legislature. Government centered in a director and council. The director's authority came from a mercantile company in the Netherlands, while the council was a small body mainly composed of the director's appointees. Attempts on the part of the colonists to influence affairs in any way were always opposed.

After the capture of the colony by the English the royal charter of 1664[1] simply substituted an English duke as proprietor in place of a group of Dutch merchants. He was given authority

. . . "to correct, punish, pardon, govern and rule all such the subjects of us Our Heirs and Successors who may from time to time adventure themselves into any of the parts or places aforesaid."

He was also given authority

. . . "to make, ordain and establish all manner of Orders, Laws directions, instructions, forms and Ceremonies of government and Magistracy fit and necessary for and Concerning the Government of the territories and Islands aforesaid. . . "

There was reserved, however, to the colonists the right of appeal to the King in cases where they felt justice had not been received at the hand of the proprietor or his agents.

One of the first steps taken by the royal commissioners after the surrender of the colony was to issue a proclamation promising the people protection,

. . . "and all other privileges with his Majesty's subjects." [2]

With the examples of Massachusetts, Connecticut, and Virginia before them we know what "privilege" was most highly prized by the colonists. Without doubt it was representation in the government.

In addition to the proclamation this hope was strength-

[1] Brodhead, II, 651.

[2] Journal of the Legislative Council, I; Introduction, III.

ened by a letter written by Governor Nicholls late in August, 1664, to Captain Young, of Long Island. In this the governor thanked those who had taken up arms in helping establish the English rule. Further than that he promised that

"Deputys shall in convenient time and place, be summoned to propose and give their advise in all matters tending to ye peace and benefitt of Long Island." [3]

That the governor had no authority to make such a promise is evident from reading his commission.[4] But he kept his promise to a certain extent though quite evidently not as the people understood it. A few months later he addressed a circular to "The Inhabitants of Long Island"[5] in which after recounting the trials of the Long Island towns he ordered:

"That upon the Last day of this present ffebruary at Hempsteed upon Long Island, shall be held a Generall meeting, which is to consist of Deputyes chosen by the Major part of the freemen onely. . . ."

Further reading makes it quite evident that what the governor had in mind in calling this assembly was to settle the numerous boundary disputes which existed between many of the towns.

In response to this proclamation, two representatives from each of seventeen towns[6] met the governor at Hempstead on March 1, 1665. The only record we have of the business transacted is an address to the Duke of York[7] and the orders issued in connection with two suits over boundaries. We have noticed that only Long Island towns were represented at the above assembly. For that and other reasons which are obvious the gathering could not be dignified by the name legislative assembly.

Time went by and Nicholls made no move to call another assembly. There were murmurings, especially on Long Island, which had the largest proportion of English inhab-

[3] Journal of the Legislative Council, I; Introduction, IV.

[4] Brodhead, II, 653.

[5] Journal of the Legislative Council, I; Introduction, IV.

[6] The names of the towns and the men representing them may be found on page five of Introduction to the Journal of the Legislative Council, Vol. I.

[7] N. Y. Col. Docs., III, 91.

itants. But matters did not reach an acute stage until Nicholls was leaving the colony, having been replaced by Lovelace. Then in November, 1669, petitions from eight towns were presented to the Court of Assizes, praying for the redress of several grievances, the principal one[8] being that an assembly had not been called from time to time as promised by Governor Nicolls. The reply they received was,

"In answer to ye 1st head wherein they desire to have Deputyes to be Joyned with ye Governor and Council. . . . It doth not appeare that Col. Nicholls made any such promise. . . ." [9]

Nearly a year passed before the towns had another opportunity of making a protest. This opportunity grew out of an attempt on the part of the governor to levy a tax to repair the palisade surrounding the fort at New York. Many of the Long Island towns refused to contribute and, while their stated reasons differ, the principle back of the refusal was the same in every case. For instance, one town agreed to contribute

. . . "if they might have the privilege that other his Majesty's subjects in these parts have and do enjoy."

Another stated its refusal

. . . "because they were deprived of the libertys of Englishmen."

It is interesting to note that these remonstrances were publicly burned before the city hall in New York.

There now followed the period of reoccupation by the Dutch which lasted until 1674. The return of English rule was marked by the appointment of Edmund Andros as governor. If there was much agitation during his term of office for an assembly the only hint we have of it is in two letters from the Duke of York to the governor. In 1675 he wrote:

. . . "touching Generall Assemblys which ye People there seeme desirous of in imitacon of their neighbor colonies, I

[8] For a summary of this whole period see the Historical Introduction to the Journal of the Legislative Council.

[9] Journal of the Legislative Council, Introduction, VI, VII.

think you have done well to discourage any Mocon of yt kind";[10]

and again in the following year,

"Such assemblyes I cannot but suspect would be of dangerous consequence, nothing being more knowne than the aptness of such bodyes to assume to themselves many privil-edges which prove destructive to, or very often disturbe, the peace of ye governemnt, wherein they are allowed. Neither do I see any use of them, etc." [11]

The opportunity for a final and effective protest on the lack of an assembly in the colony grew out of an oversight on the part of Governor Andros. Orders for the collection of the duke's revenues had been issued regularly each three years. One was issued in 1677 and expired by its own limitation in 1680. Almost coincident with the expiration of the order of 1677, Andros sailed for England to answer certain charges against his administration. He neglected to mention the customs duties in his final order to Brockholls, who was to be in authority during the governor's absence, but did order that all things should remain "as then settled". Quickly grasping their opportunity the merchants early in the spring of 1681 refused to pay the custom dues on incoming cargoes. Then followed a period of suits and counter-suits on the part of Dyer, the collector, against various merchants and of the merchants against Dyer. But the point to keep in mind is that during this year the duke was getting practically no revenue from his colony. The Long Island towns taking advantage of the disturbed condition began to assert their rights again and in some cases local authorities refused to carry out the orders of Brockholls and the council.[12]

Of course full reports of conditions were made by Brockholls. In one of his letters he said that the government "is much disliked by the People who generally cry out for an Assembly. . . ." [13]

[10] N. Y. Col. Docs., III, 230.
[11] *Ibid.*, III, 235.
[12] For a full acount of the above see Osgood, II, 162-164.
[13] Journal of the Legislative Council, I, IX.

The duke now yielded to the demand of his colonists but there is no doubt that his impelling motive was an economic one.[14] On March 28, 1682, he wrote to Brockholls as follows:

". . . I send this to tell you that I intend to establish such a forme of government at New Yorke as shall have all ye advantages and priviledges to ye inhabitants and traders there, which His Mats other plantacons in America doe enjoy, particularly in ye choosing of an Assembly, and in all other things as nere as may be agreeable to ye laws of England." [15]

Colonel Thomas Dongan was now appointed governor by the duke and among his duties was the carrying out of the promise of an assembly. Considerable space was given in his Instructions[16] to this matter. As soon as possible after his arrival he was to issue a summons calling an election of representatives. The assembly was to consist of not more than eighteen members. They were to have freedom of debate but all measures passed were to be subject to the assent and dissent of the governor. The proprietor was also to have a negative on all laws. Regarding revenue all laws on the subject should plainly state that the money raised was for the express use of the proprietor, and no bill decreasing the revenue could be passed without the prior consent of the proprietor.

Late in August, 1683, Governor Dongan issued writs for the election of representatives to the assembly.[17] The date set for its meeting was October 17 and the place of meeting was to be Fort James in New York City. The assembly thus chosen met at the appointed time and place. Its journal having been lost the names of most of the men comprising it are not known. This assembly sat for three weeks and passed fourteen acts, only one of which affects this study.

This was an act entitled

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[14] Journal of the Legislative Council, I, XVI. For quite a different view, however, see Brodhead, II, 373-374.

[15] N. Y. Col. Docs., III, 317.

[16] *Ibid.*, III, 331-334.

[17] Journal of the Legislative Council, I, XI. This reference also contains the names of towns or districts entitled to representation and the number of representatives assigned to each.

"The Charter of Liberties and Priviledges, granted by his Royal Highness to the Inhabitants of New Yorke and its dependencies." [18]

This stated that the Charter was enacted

. . . "by the Governor, Councell, and Representatives, now in Generall Assembly met."

And further,

. . . "That the Supreme Legislative authority, under his Majesty and Royal Highness James Duke of Yorke, Albany, etc., Lord Proprietor of the said Province, shall forever bee and reside in a Governour, Councell, and The People, mett in a Generall Assembly."

Another provision was,

. . . "That, according to the usage, custome and practice of the Realm of England, a sessions of a Generall Assembly be held in this Province, once in three years at leaste."

Representatives were apportioned to the counties[19] and it was provided that

. . . "every freeholder within this Province, and freeman in any corporation, shall have his free choice and vote in the electing of the Representatives, without any manner of constraint or imposition, and that in all elections, the majority of voices shall carry it."

This charter along with the other laws passed by the first assembly were finally approved by the proprietor in England, but their return was delayed, and before they were sent the death of Charles the Second changed the whole situation, automatically changing New York from a proprietary to a royal province. Within a month of the duke's accession to the throne as James the Second, the laws passed by the New York Assembly, or at least the charter above referred to, came before the Committee of Trade and Plantations for examination. A report was made on it by a meeting at which it is said James presided in person. The section providing

[18] Brodhead, II, 383; *Ibid.* note p. 382; N. Y. Col. Docs., III, Note p. 355; N. Y. Col. Laws (1664-1776), I, 111.

[19] The names of these with their boundaries were given in another section of the act.

. . . "That the Supreme Authority shall remain in the Governour, Councell and the People mett in a Generall Assembly"

was objected to on the ground that,

. . . "The words The People met in a General Assembly are not used in any other Constitution in America; but only the words General Assembly." [20]

Several other sections were objected to also and as a result of the hearing the charter was not confirmed. Two days later James wrote Dongan[21] calling his attention to the fact that the death of Charles had ended the proprietorship and asking him to tell the people that the new king had committed

. . . "to Our said Privy Council the care of Our said Province with the consideration of the several bills and addresses lately presented unto us from Our assembly there. They may shortly expect such a gracious and suitable return by the settlement of fitting privileges and confirmation of their rights as shall bee found most expedient for our service and the welfare of Our said Province."

In the meantime the assembly met in its second session in October, 1684. Thirty-one acts were passed and assented to by the governor, none of which affects this study. Before the time of the third session, in the fall of 1685, news of the king's death reached the colony and the question was at once raised whether the assembly was not dissolved in consequence. Upon the advice of the council, Dongan dissolved the assembly and ordered the election of a new one.[22]

The assembly elected in response to this summons met in November, 1685. Only six acts which received the governor's approval were passed. In adjourning, the assembly set as the date of its second session September 25, 1686, but as events were to prove, the first session was the only session of a New York assembly during the reign of James the Second. As the time drew near for the second session of the second assembly,

[20] N. Y. Col. Docs., III, 357.
[21] *Ibid.*, III, 360.
[22] Journal of the Legislative Council, I, XIV.

no official order had come from England forbidding its meeting. Nevertheless, on September 4, 1686, Governor Dongan prorogued it until March 25th following.[23] The governor must have had secret advice of the decision of the king for just ten days after he prorogued the assembly he received his commission as royal governor of the province;[24] a commission which expressly empowered him to exercise full legislative and executive power in conjunction with the council.

His Instructions, which accompanied his commission, contained this paragraph:

"And whereas wee have been presented, with a Bill or Charter passed in y^e late Assembly of New York, containing several ffranchises, privileges and Immunitys mentioned to be granted to the Inhabitants of our said province, You are to Declare Our Will and pleasure that y^e said Bill or Charter of Franchises bee forthwith repealed and disallowed, as y^e same is hereby Repealed, determined and made void." [25]

When one keeps in mind the movement on at this time to combine all the New England colonies into one government and to vacate the charters of all those colonies which would not voluntarily surrender them, the abolishing of the assembly in New York simply becomes part of a movement to substitute in America government by royal authority, without regard to the desires of the governed for the limited freedom which most of the colonies had enjoyed up to this time.

We can do no better in closing this study of the preliminary steps in the development of an assembly in New York than to quote Osgood:

"New York consisted as yet of a number of loosely connected sections. The two components of its population—Dutch and English—had not yet grown together into a political whole. They spoke different languages. Many differing forms of religious faith existed within the province. The larger part of its people had long been accustomed to autocratic rule. The charter guaranteed nothing different. Commercial interests predominated in the city, where, if anywhere, continued and successful opposition to autocratic

[23] Journal of the Legislative Council, I, XV.
[24] N. Y. Col. Docs., III, 378. [25] *Ibid.*, III, 370.

government could be maintained. New York, moreover, formed the center and starting point of a great imperialistic scheme of colonial union, and it was without power to resist. For these reasons the permanent establishment of representative institutions in that province was postponed until it could be achieved by a government in England which favored their maintenance in all the colonies." [26]

News of the landing of William of Orange in England reached New York in February, 1689. Lieutenant Governor Nicholson tried to keep it secret at the same time attempting to get into touch with Governor Andros who was in Maine. But the news through other sources reached Jacob Leisler, a well-to-do merchant of New York City. For personal reasons Leisler was not on good terms with several of the leading councilors, yet the peace of the colony does not seem to have been disturbed until news reached New York of the uprising in Boston and the later imprisonment of Andros. This was the signal for Leisler and his followers to undertake a similar movement in New York. The details of the so-called Leisler Rebellion do not concern this study, but on the other hand, the fundamental aim of the revolt does concern it intimately. Osgood says that the Leisler rebellion has its place in a series of events—mainly protests—which began with Kieft's Board of Nineteen, and which finally resulted in the permanent grant of a legislature to New York in 1691.[27]

Lieutenant Governor Nicholson left New York for England in June, 1689, and for nearly two years there was no representative of the crown in the colony except the members of the council whom Leisler refused to recongize. After a year of turmoil and because of need of funds to carry on the Indian war which had now reached an acute stage, Leisler called an assembly in April, 1690. The only act of importance was one providing for the raising of revenue. This assembly met again in September. There is no way of telling whether the representatives composing this assembly were all residents of the counties they represented.

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[26] Osgood, II, 168.

[27] For a full statement of the various elements entering into the Leisler Rebellion, see Osgood, III, Chap. XV.

While New York was passing through this period of turmoil a new governor had been appointed (1689), but he did not reach the colony until 1691. On March 19, of that year, Governor Sloughter arrived and promptly published his commission. This commission[28] ordered the early calling of an assembly. Writs were issued for an assembly to meet April ninth. Under this commission all laws passed by the assembly were subject to a double veto, of the governor and of the crown. It should be remembered, however, that laws receiving the governor's approval were considered in force in the colony from the time of such approval until word came of the crown's veto. The assembly met at the stated time, and on May 13th, passed an act entitled:

. . . "An Act declaring what are the Rights and Priviledges of their Majesties Subjects inhabiting within their Province of New York." [29]

This act closely followed the so-called charter passed by the assembly of 1683. The opening paragraph thanked the crown for

. . . "restoring to them the undoubted Rights and Privil-edges of Englishmen."

The act provided for a session of the assembly each year; that all freemen of any corporation and every freeholder of the province should have a vote in the choice of representatives. The term freeholder was defined as meaning one who should have

. . . "forty shillings per year in freehold."

A further provision was that the assembly was to be the

. . . "sole Judges of the Qualifications of their own members."

But no residential requirement appears in the act.[30]

[28] N. Y. Col. Docs., III, 624.

[29] Colonial Laws of N. Y., I, 246.

[30] Since this is the first of the unbroken line of New York Assemblies the apportionment of representatives may be of interest.

City and County of New York	4
Suffolk County	2
Queens County	2

Governor Sloughter was succeeded the next year by Fletcher, whose administration covered the years 1692-1698. During this period there was a revolt in the minds of many men over the penalty inflicted on Leisler and Milborne. The small property-holders, the propertyless, and the rural people came to see in Leisler, though now dead, a champion of those principles which were at stake in their contests with the wealthy merchants of New York and the great landholding gentry. As a result the elections of the period covered by Fletcher's and Bellomont's administrations and extending even into Cornbury's (1692-1702), were bitterly contested between the Leislerians and the anti-Leislerians or Jacobites, as their political enemies called them. Fletcher sided with the aristocratic party and there is plenty of proof that during his administration the assembly was dominated and intimidated and elections interfered with.[31]

Richard, Earl of Bellomont, had been appointed governor in 1695, but did not arrive in the province until early in 1698. He at once let it be known that he thought colonial affairs were in bad shape and that his opinion of his predecessors was not a very good one. This, of course, gave hope to the Leislerian faction and won for Bellomont the opposition of the merchants and propertyholding class. It is interesting to note the differences in the charges against Fletcher and Bellomont by their respective enemies. The Jacobite side of the controversy is set forth in full in Accusations vs. Bellomont, which can be found in New York Colonial Documents, IV; 620-623. The gist of the whole accusation seems to be the following, however:

"That soon after his Lordship issued out writts for chusing a new Assembly, and the Election was appointed to be upon the same day in all places except the two most remote Counties

Kings County	2
Richmond County	2
Westchester County	2
Ulster County	2
City and County of Albany	2
Duke's County	2
Colony of Rensselaerswyck	1

[31] See Letter of Peter De La Noy, June, 1695, N. Y. Col. Docs., IV, 221, 322, 323, 507, 511.

whereby the best freeholders who had estates in several Counties, were deprived of giving their votes at several elections."

The question here raised was one which was a source of contention in New York politics for many years.

Attention has been called to the political situation in the province at the time of the coming of Lord Bellomont in order to provide a background for a proper understanding of some of the acts passed under his administration and that of his successor. While the records are not definite on the subject the assembly of 1698 was probably chosen after Bellomont's arrival and under writs issued by him. No act of this assembly concerns this study. But on May 19th, Bellomont addressed the council and assembly and among other things called their attention to the abuses which had developed in the election of members and promised his approval of a law to remedy them.[32]

A new assembly was chosen in 1699 and it proved to be a most bitterly contested election. William Nicoll was the Jacobite leader and he rode all over the state urging the people that now was the time to withhold the royal revenue. The result of the election, however, gave the Leislerians sixteen members out of twenty-one. Acting either on the governor's suggestion or because of their own desire to remedy conditions the assembly passed an act entitled:

"A bill for ye Regulateing Elections of Representatives in General Assembly in each Respective Citty and County within this province.

". . . Bee it Enacted by his Excel ye Gov'r and Councill and Representatives Convened in Generall Assembly And it is hereby Enacted by ye Authority of ye Same yt ye Representatives of ye Cittyes and Countyes to be Chosen within this province to come to ye Assembly of our Lord ye King in this province hereafter to be holden shall be chosen in every Citty and County and manner of this province who have right to Choose by people dwelling and resident in ye Same Cittyes Countyes and mannors whereof every one of them shall have Land or Tenem'ents Improved to ye value of

[32] Council Journal, I, 112.

fforty pounds in free hold free from all Incumbrances and have possessed ye Same three months before ye test of ye said writt and they which Shall be Chosen shall be Dwelling and Resident w'thin ye Cittys Countys and Mannors. . . ." [33]

We shall find later that at their first opportunity the Jacobite faction repealed the above but it seems quite clear that the reason of their opposition had nothing primarily to do with the question of a residential qualification except as that question was inextricably mixed with the one of a residential qualification for electors. The reasons why the wealthy, propertyholding class objected to the latter restriction are quite evident in the light of the sentence quoted above in their accusation against Lord Bellomont.

The law of 1699 evidently did not end all irregularities connected with elections, for in October, 1701, the assembly passed an act the title of which read

"An Act for the more regular preceedings in the Elections of Representatives for the Severall Cities and Counties within this Province." [34]

This law does not mention qualifications for representatives but deals with denying the suffrage to Catholics; making more explicit the definition of freehold; and providing for what might be called technical non-residence voting, inasmuch as for seven years

. . . "the freeholders of Dutchess County shall and are hereby Impowered to give their votes for Representatives in the County of Ulster, as if they actually lived in said County."

On May 1, 1702, this same assembly, two days before its dissolution, passed another election law increasing the total number of representatives; increasing the representation of some towns; giving the right of representation to several new counties; and providing for temporary non-residence representation for certain specified places. This portion of the act reads:

[33] N. Y. Col. Laws, I, 405. In the Journal of the Assembly the proceedings from April 25, 1699, to October 29, 1700, are missing, so we do not know the arguments advanced for and against this measure.

[34] N. Y. Col. Laws, I, 452.

". . . And be it further enacted by the authority aforesaid that the Town of Schnectady, Nistigionne and half Moon, and the Town of Kinderhook and all that part of the Colony of Renslaerwyck shall and may Elect any Sufficient ffreeholder of the City and County of Albany[35] to represent either of the said Towns if they so think fit any Law, usage or Custom to the Contrary hereof in any wayes notwithstanding." [36]

Lord Bellomont died in March, 1701, and at the time of his death John Nanfan, the lieutenant governor, was in Barbadoes. The anti-Leislerians at once began their campaign and there was great turmoil in the province from March to June. The assembly chosen was Leislerian however.

Late in 1701 news of Lord Cornbury's appointment as governor reached the province and caused great joy to the Jacobite faction. Nicholas Bayard became especially violent in seeking to upset the work of Bellomont, and as a result was condemned to death under an act which he had been instrumental in passing ten years before to expedite Leisler's conviction. The sentence against Bayard was never carried out, as he was allowed an appeal to England. In May Lord Cornbury arrived and promptly aligned himself with the aristocratic party. The assembly which was now elected under writs of the new governor was strongly anti-Leislerian.[37] On November 27th, it passed a law specifically repealing the election law of 1699. This act also contained a provision repealing all laws

. . . "made, pronounced, published or Promulgated . . . since the first day of August, 1701." [38]

To fully and thoroughly complete the task one provision was:

"And that the Memory of these pretended Act and Acts of General Assembly may be wholly Obliterated, Deleted and buried in perpetual Oblivion." [39]

The Election Act of 1699 was approved by the King, Septem-

[35] The places mentioned were all in Albany County.

[36] N. Y. Col. Laws, I, 479.

[37] The change in the political complexion of an assembly to correspond with that of the governor raises grave doubts concerning the fairness of the elections. The sheriffs were a great power and the New York records are full of instances of sheriffs being charged with corrupt practices in connection with elections.

[38] N. Y. Col. Laws., I, 524. [39] *Ibid.*, I, 524.

ber 5, 1700,[40] but the one of 1702 was disallowed by Queen Anne in June, 1708,[41] leaving the former one in force.

As the question of residence as a qualification for representation does not appear in any act of the assembly again until 1769, let us see what was the practice of the people in this regard. Prior to legislation on the subject the only instance of non-residence representation discovered by a careful checking of the lists was in the very assembly which first passed a law touching the matter. Abraham Governeur, a son-in-law of Leisler and a resident of New York City, represented Orange and Kings counties in the assembly of 1699, but appears as a representative for New York in the assemblies of 1701 and 1702.[42]

When the assembly of August, 1701, met the seats of two members were challenged on the ground of non-residence under the law of 1699. William Nicoll had been returned for Suffolk County but was dismissed under the above act. None of the colonial records give us exact data as to Nicholl's residence. Everything points to New York City however. Nevertheless, he later represented Suffolk County continuously from 1702 to 1710,[43] and if he were not a resident the fact that his seat was not challenged after 1701 can only be accounted for by the fact that during that time his faction controlled the assembly.

The other member whose seat was challenged under the act of 1699 was Dirk Wessels, who had been returned by City and County of Albany. He was a merchant of Albany but lived part of each year on his farm in Livingston Manor.[44] He had laready represented Albany continuously from 1691 to 1695,[45] and was an alderman there in 1700.[46] He must have had some doubt, however, whether he could qualify under the act of 1699, for during the investigation of his case the following curious document was read into the record:

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[40] N. Y. Col. Docs., V, 25.

[41] N. Y. Col. Laws, I, 523. The Queen took this action on the recommendation of the Lords of Trade.

[42] Assembly Journal, I, 93, 139.

[43] *Ibid.*, I, 144, 195, 219, 239, 271.

[44] Schuyler, II, 331.

[45] Assembly Journal, I, 1, 31, 35, 54.

[46] N. Y. Col. Docs., IV, 727.

"Know all Men by these Presents, That I Dirck Wessels, of the City of Albany, of the Province of New York, am holden and firmly bound, unto Jonathan Broadhurst, Esq.; High Sheriff of the City and County of Albany aforesaid; in the penal sum of One Hundred Pounds, Lawful Money of this Province, to be paid to the said Jonathan Broadhurst, his Heirs, Executors, Administrators or Assigns; for the which Payment, well and truly to be made, I do bind myself, my Heirs . . . firmly by these Presents, sealed with my Seal, dated this 14th Day of July, in the 13th Year of his Majesty's Reign, Anno Domini, 1701.

"The Condition of this Obligation is such, That whereas, 'tis required by a late Act of Assembly of this Province, entitled, An Act for the regulating of Elections, etc., That all Persons chosen to serve as Representatives, in the Assembly of this Province, shall be dwelling and resident within the same Cities, Counties and Manors, for which they are chosen; and whereas, Major Dirck Wessels above named, expects to be put up for a Candidate, in the Election of Representatives for the City and County of Albany; now if the said Dirck Wessels, his Heirs . . . , do idemnify the said Jonathan Broadhurst, his Heirs . . . , from all Pain and Forfeiture, which he may any ways incur by returning the said Dirck Wessels, (if he be chosen) a Representative as aforesaid, in Respect of his the said Dirck Wessels, being a Non-Resident as aforesaid; then this present Obligation be void and of none Effect, otherwise to remain in full Force and Virtue.

Sealed and Delivered in the Presence of

Jacob Turck,
S. Clowes.

Dirck Wessels, (Seal).[47]

The sheriff was called before the assembly to produce the poll book but he was not reprimanded for entering into such a bargain with a candidate. The intensity of partisan feeling in the assembly of 1701 is shown by the fact that when Nicoll and Wessels were ordered to withdraw on August 20, eight other members went with them. The eight, not having returned by the twenty-sixth, were expelled and writs issued for elections to fill their places.[48]

[47] Assembly Journal, I, 116.

[48] *Ibid.*, I, 116, 118.

The next instance we find of non-residence representation was in 1722 when Adolphus Philipse, a resident and merchant of New York City, was the representative for Westchester County, where he had large holdings. His seat was not challenged. For several years following the above date he represented his own city.[49]

On November 10, 1743, John Yelverton, of Orange County, presented a petition[50] calling the attention of the assembly to the election law of 1699. The petition in part follows:

"That contrary to the Intent and Meaning of the aforesaid Act, Theodorus Snediker, Esq.; High Sheriff of Orange County, hath lately returned Mr. Gabriel Ludlow, as duly elected a Representative to serve in the present General Assembly, for the said County of Orange, although the said Gabriel Ludlow, then was, and still is dwelling and resident in the city of New York, and not in the County of Orange, and refused to return your Petitioner as duly elected, although he well knew that your Petitioner . . . had the greatest number of votes of any Persons within the same County."

Despite the above Ludlow was declared duly elected and was seated. Immediately thereafter, Colonel Lewis Morris, who was later to figure in a similar case, moved for leave to bring in a bill regulating the election of representatives. Leave was granted but the final action on it shown by the records was the postponement of its consideration until the next assembly.[51] It does not seem to have been presented at that time, so we do not know what Morris had in mind except as it is revealed in a statement of his in connection with a similar case two years later.

In 1745 Edward Holland, of New York City, petitioned the assembly against the seating of Captain Arent Brandt, from Schenectady, claiming the seat himself.[52] The assembly held long hearings on this petition. Counsel for Brandt argued that as Holland was not an *inhabitant* (note that he

[49] N. Y. Col. Docs., VI, 56.
[50] Assembly Journal, II, 3.
[51] *Ibid.*, II, 4, 7.
[52] *Ibid.*, II, 65.

did not use the word *resident*) of Schenectady, he was not qualified to represent it. One member urged the postponement of any decision on the question till the next session on the ground that matters involved were of such moment that the

> . . . "Consequences, greatly endanger the Liberties and Properties of our Constituents, and even affect our very Constitution. . . ' '," [53]

Colonel Lewis Morris moved that the matter be placed in the hands of judges of the Supreme Court on the ground that

> ". . . A mistaken Resolution of this House, may endanger every Thing that is dear and valuable, and even shake the very Foundation of that Right, by which we sit here." [54]

The Morris motion was defeated and the assembly's decision was that under the laws of the colony Holland was not entitled to represent Schenectady. The fact that Morris should move that a decision be obtained from the highest provincial court on a given situation apparently plainly covered by colonial statute shows clearly that a certain group of men in the province felt that there was a distinction between legal and actual residence.

The next election law and also the next contested election which hinged on the question of residence both come in the year 1769; but before we take them up let us look just for a moment at some phases of legislative development during the first seventy years of the eighteenth century. It had been one long period of contests between the assembly and the royal governors. While the assembly was often torn by factions yet on matters of vital importance they would usually unite against a governor. The chief items of contention were, of course, revenue bills which the assembly asserted time and again should be granted annually instead of for a long period of time.

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[53] Assembly Journal, II, 78. [54] *Ibid.*, II, 79.

One of the chief complaints of the assembly was the frequent prorogations and dissolutions by the governor when he had a refractory assembly, and on the other hand of the length of time he would keep an assembly, which had proved pliable and friendly, in existence. For example, the assembly of October, 1715, was dissolved August 10, 1726, having been in existence eleven years. The one of July, 1728, lasted nine years, being dissolved in 1737.

Attempts were made from time to time to remedy this condition. A Triennial Act was considered in 1728, but as the council opposed it, it was dropped.[55] A similar act was passed in 1737, which this time received the approval of the council[56] but was adversely reported by the Board of Trade and vetoed by the Crown.[57] In connection with the latter Lieutenant-Governor Clarke wrote the Board of Trade stating that the chief argument for such a bill was that the province was shunned by immigrants in favor of the corporate colonies and proprietory provinces where the assemblies were frequently chosen.[58] Finally, in 1743 a Septennial Act[59] was passed which received royal approval and which remained in force well into the nineteenth century.

The Election Act of 1769 evidently grew out of two contested elections of that year or more probably out of one in Westchester where the election had been decided by non-resident electors. On April 12, 1769, John Thomas, of Westchester, presented the following motion:

"I find by an act passed by the general assembly of the Colony of New York the 8th of May, 1699, it is among other things enacted, for regulating elections in the colony, that no non-resident should have a right to a seat in the House of the Assembly. I find that Mr. Philip Livingston is returned for the manor of Livingston, in the county of Albany; I move for the aforesaid reasons, his not being a resident, according to the Act of the Assembly, that he may be dismissed from his attendance of this house." [60]

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[55] N. Y. Col. Docs., V, 874.
[56] Council Journal, I, 705.
[57] N. Y. Col. Docs., VI, 136.
[58] *Ibid.* VI, 112-113.
[59] Assembly Journal, II, 10; Council Journal, II, 2026.
[60] Assembly Journal (1766-1776), 24.

It may be of interest to note the names of those voting to dismiss the above motion: Ten Broeck, Morris, Ten Eyck, Schuyler, Mynderse, Clinton, De Witt, Van Cortland . . . almost the solid New York and Albany delegations and every one great land owners.

Consideration of the motion was postponed from time to time but was finally taken up on May twelfth, on which date a long petition was presented by the freeholders of Livingston. As this covers the whole question at issue from all its various angles, the best of any document appearing in the provincial papers of New York, it is given in full:

"The petition of the subscribers, being freeholders of the Manor of Livingston, in the County of Albany,

Humbly Sheweth,

That your petitioners, in virtue of His Majesty's writ for electing a representative for representing the said manor, in the then next, and now present, General Assembly, lately directed to the returning officer from the said manor, did unanimously elect Philip Livingston, Esq., to serve in this present Assembly, as their representative, who was accordingly returned, and admitted to his seat in this honorable house.

"That your petitioners have since been informed that a motion was made . . . for dismissing the said Philip Livingston . . . as not qualified according to an Act of Assembly . . . said to have passed on the eighth of May, 1769. . . .

"That your petitioners knew of no other act of this colony, respecting the residence of persons to be elected to serve in General Assembly, than a certain act passed the eighth day of May, in the year 1699 . . . which your petitioners humbly conceive neither ought, nor was, intended to deprive them of their right to be represented in this honorable house, by any representative, otherwise legally qualified, though not actually residing in the said manor, for the following reasons:

"First; Because the words in the said act relative to the residence of the persons to be chosen, are the same with those in the act of Parliament, passed in the eighth year of King Henry the Sixth, and your petitioners beg leave to observe, that, notwithstanding the said act of parliament, it is notorious that the electors in the several counties, cities and borough in England have constantly chosen, and been represented by persons not actually residing in the same. From which your

petitioners conclude, that the construction put upon those words by the Parliament of Great Britain, clearly shows, that the intention of the said act of parliament was not to exclude non-resident members from their seats in parliament, but to exempt them from the burden of serving for places where they do not reside, and to which the common law would compel them, were they not thus exempted, and is evidently in favor of your petitioners being represented by persons not actually residing in the said manor who do not except to the service.

"Secondly—Because, except in three instances (excluding at present the case of the said manor) it has been the invariable usage of the General Assemblies of this Colony, to admit representatives to represent the several counties in this colony who did not actually reside within the same, of which your petitioners find upon the journals of the house, twenty-one examples; and with respect to the said three instances, which were the cases of William Nicoll and Dirck Wessels, in the year 1701, and of Edward Holland, in 1745; your petitioners doubt not they will appear from the said Journals, to have originated from party spite, expecially, as in the year 1743, Mr. Gabriel Ludlow, was admitted by the then General Assembly, on a controverted election, a representative for Orange County, though he then resided in the city of New York.

"Thirdly—because the said manor of Livingston, in particular, except only in three instances, has been constantly represented in General Assembly, for the course of fifty-three years, by persons not actually residing within the same, which your petitioners find to have been the case in eleven different assemblies.

"Fourthly—Because the words in said act of Assembly pretended to require the actual residence of the person elected, are the same with those respecting the residence of the electors; and your petitioners do not remember that it was ever doubted that the elector, if duly qualified, with respect to his freehold, to vote for a Representative in General Assembly, was also qualified to vote, without actually residing in the county in which his freehold lies, from which they conceive it evident, that a freeholder may also be elected, and is duly qualified to serve, notwithstanding his not actually residing; and the same Philip Livingston, being a freeholder in the said manor, your petitioners conceive his right to serve as a representative for the same, cannot be called in question, without at the same time impeaching the right of every non-

resident freeholder to choose a representative for the county, in which he has a freehold.

"Fifthly—Because your petitioners are advised, that in construction of law, and by solemn adjudications in the courts of justice, every person does reside in the county, manor or borough, in which he is a freeholder.

"Sixthly—Because the contrary construction would reduce great numbers of the inhabitants of this colony to the grievous and unconstitutional hardship of being taxed for estates which are not nor can be represented, and introduce the pernicious doctrine of a virtual representation, invented by the enemies of America, and manifestly tending to the subversion of that most invaluable privilege of not being taxed without our own consent.

"Seventhly—Because by the first section of the above mentioned act for regulating elections, it is among other things enacted, that the place where the freehold of the elector lies, shall be set down by the clerks of the poll, and no notice is required to be taken of the place of his residence, whence your petitioners infer that the actual residence of the elector is not by the said act, intended as any part of his qualifications to choose, and as by the first section of said act the words *dwelling* and *resident* are applied both to the electors and elected and must, as before observed, be understood in the same sense, your petitioners think it plainly follows, than at actual residence cannot, in the sense of the act, be a necessary qualification for the elected nor requisite to entitle him to a seat in this honorable house. And this construction, your petitioners conceive, farther corroborated by the oath prescribed by the same act, which only respects the elector's freehold, without taking any notice of his residence And,

"Lastly—Because the legislature have in the tenth section of the said act, clearly distinguished between a legal and actual residence, by enacting that the freemen of the cities of New York and Albany, who have actually dwelt in the said cities respectively, three months before the tests of the writs of election, shall have liberty to vote in their respective corporation.

"For all which reasons, your petitioners pray this honorable house, to reject the said motion, as contrary to the true sense and spirit of the said act of assembly, the usage of parliament, and the general course of proceedings in assembly. Manor of Livingston, April 18, 1769." [61]

[61] Assembly Journal (1766-1776), 59.

After the reading of this petition the motion to dismiss Livingston was carried. Those voting in the negative were practically the same as the list given above. Livingston was a New York merchant.[62]

The session of April, 1769, to May, 1770, was marked by another contest. On the second day of the session, a petition from certain inhabitants of Westchester was persented asking for the seating of John De Lancey in place of Lewis Morris, who was not a resident, according to the petition. A week later when the matter was up again Representative De Witt made this speech:

"As it is essential to civil liberty, that no tax be levied that is not the free gift of the people, and the distresses into which these colonies have, for several years past, been plunged, flow from the pernicious doctrine of a virtual representation, and it is the indispensible duty of this house to discountenance it to the utmost of their power; and since the exclusion of a member holding a freehold in the county or place for which he is returned, from having a seat in this house, on account of his non-residence there, may draw into question the rights of electors to the choice of representatives, in places where they do not reside, and the taxation of the estates of such persons, will consequently strongly imply the approbation of this house, of the odious and dangerous principle assumed by the enemies of the colonies, and the prosperity of the whole empire." [63]

Counsel for Morris and De Lancey presented their arguments before the house on April 15. The former contended that the act of 1699 did not apply to Westchester but gave no reasons in support of his argument. If it did apply, he continued, Morris had a right to his seat as he had

. . . "a considerable estate within the said borough."

Final action came on April 20, when it was decided that Morris did not have such a residence in Westchester as qualified him to represent it and his dismissal was ordered.[64] This decision did not stop the proceeding, however, regarding the contested election. On April 26, it was announced to the House

[62] Schuyler, I, 280. [63] Assembly Journal (1766-1776), 27, 28.
[64] *Ibid.*, (1766-1776), 6, 8, 22, 26, 28, 30, 36, 37, 38, 42, 51, 68, 75, 77.

that the two contestants had agreed that fourteen non-resident electors had voted for De Lancey, and three for Morris,[65] and that if the House decided that non-resident electors had no right to vote De Lancey would drop the contest and give Morris the seat. The House decided that non-resident electors had the right to vote for representatives.[66] De Lancey then asked the privilege of introducing the following bill:

"An Act to explain and amend an Act entitled 'An Act for Regulating Elections of Representatives in General Assembly' made and passed the eighth of May one thousand six hundred and ninety nine, in the eleventh Year of King William the third." [67]

The first part of the act is taken up with the question whether a person having a freehold in a certain county or town should be allowed to vote there though a non-resident. The law gave such persons that privilege provided that in other respects they qualified as electors. On the subject with which this study deals the act provided:

"And Whereas it is highly necessary that the Representatives Chosen to serve in General Assembly should not only have improved Landed Estates amongst their Constituents but ought also to be inhabitants and actual residents among them to the end that they might be perfectly acquainted with the true state and Circumstances of the People they are to represent, to prevent therefore the many inconveniences that may arise by choosing Non-Residents to serve in the General Assembly.

"Be It Further Enacted by the Authority aforesaid that no Person shall hereafter be capable of being elected a Representative to serve for any City, County, Town, Borough or Manor in this or any future Assembly, unless his usual Place of abode shall be in such place for which he shall be so elected, and has been so for six months at least before the Test of the Writ of Summons, and unless he shall have possessed a sufficient Freehold Six Months before the Test of the Writ of

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[65] Non-resident electors voted for a resident.

[66] While the Morris-DeLancey contest was on Colonel Schuyler asked for the appointment of a committee to investigate the whole question of non-residence representation giving the names of men, towns, counties, dates and time of representation. This was not acted upon.

[67] N. Y. Col. Laws, IV, 1094.

Summons, free from all incumbrances whatsoever, situate and being in the City, County, Town, Borough or Manor for which he shall be so elected." [68]

The use of the phrase "usual place of abode" in the above instead of the word "resident" or "residing" was doubtless an attempt to get around the double meaning of "resident" which was then common in English political practice and which could be brought to the fore whenever a wealthy New York or Albany man wished to be elected from a county in which he had an estate.

This law received the approval of governor and council. When it came before the council it received only one dissenting vote, that of William Smith, Jr. His reasons were:

"Because incapacitating non Residents from representing their Electors is an alteration of the Election Act of 1699 (the first section of which is nearly similar to the Statute of the 8th of H. VI., Cap. 7) is repugnant to the constant usage of Parliament, and the general practice of the Assembly for near seventy years past, abridges the Right of Electors in all the Counties, and may be very prejudicial to the City and County of New York in particular, where it is for many reasons most probable the greater number of non Resident Members would reside; and is the more unreasonable with respect to the City since this Capital sends only four out of twenty seven Members, tho' it bears one third part of the Burden in all Publick Levies." [69]

On May 26, 1769, Governor Moore wrote to the Earl of Hillsborough regarding four bills out of the twenty passed at the session of 1769 and to which he had given his assent. Referring to the election act he said:

"Altho' the title of this Act sets forth, that it was intended to explain and amend an Act passed so long ago as the year 1699, I believe it will appear to your Lordp and to every unprejudiced person, that the Law in question, did not require any real explanation, or that any doubts could possibly arise concerning the meaning of it, as it is expressly declared therein, that all persons chosen representatives in the General Assembly, as well as the Electors themselves,

[68] N. Y. Col. Laws, IV, 1095. [69] Journal of the Legislative Council, II, 1706.

shall be resident in the Cities, Counties and Manors, where such election is made. The present Law declares that the Representatives must be Resident, but that the Electors are not obliged to be so, and gives an explanation of the Act repugnant both, to Reason and Justice, as these persons whose usual residence is in this City, and are in general best qualified for representatives in the House of Assembly, are precluded from being chosen in any County or Borough, notwithstanding they may have a considerable Estate there."[70]

Despite the governor's opinion of this measure he approved it. The balance of his letter is an explanation why he did so, and gives us an insight into the influences which actuated the royal governors in many of their contests with the colonial legislatures. The disapproval of the election act of 1769 by the crown in June, 1770, left the province under the act of 1699.

Only one more contest hinging on the question of residence occurred before the adoption of the first state constitution. In 1772 John De Lancey was returned for Westchester and his seat was challenged on the ground that he was a non-resident. While the question was up De Lancey himself moved:

"That before the house come to a determination on this matter, that they resolve that no person is capable of being elected a representative to serve for any city, county, town, borough or manor, in this or any future general assembly, unless he be an actual resident, and shall continue to reside in such place for which he shall be so elected, and hath resided at least six months before the test of writ and summons." [71]

This motion was passed but there is no record of its ever being sent to the council or the governor for approval. The vote on De Lancey's right to his seat was then taken and he was dismissed as a non-resident. This action is hard to understand in the light of the Morris-De Lancey controversy of just three years previous in which Morris was dismissed from the assembly for non-residence and De Lancey was given his place.

[70] N. Y. Col. Docs., VIII, 167.

[71] Assembly Journal (1766-1776), 17.

De Lancey had received an English military education and later fought with the English in the Revolutionary War,[72] so it is possible that his dismissal grew really out of dislike for his political convictions.

This brings us to the end of the colonial period, the point at which, or before which, our study of each colony generally ends, for by that time most of them had a definite and well recognized residential qualification for representatives. As we have seen, New York had a law on that subject dating back to 1699, but we have also seen that the electors had put a construction on the word "residence" which practically nullified the law.

So we might say that when New York adopted its first constitution it had no residential qualification for representatives as that qualification was generally understood. In order that our study may be complete we will examine briefly the question of residence as related to representation from the first constitution of 1777 until the rejected one of 1915.

The Constitution of 1777 was hastily adopted (March 12–April 22).[73] It was not voted on by the people. It is said that the convention was dominated by the landowning and conservative classes. John Jay was perhaps its ablest member. An attempt was made to insert a residential qualification for representatives. Draft A of one section under the general heading (Assembly Districts) read:

". . . That all Elections for Representatives in general Assembly be made in every district annually by ballot in such mode as the Legislature may prescribe. That every district chuse one person to represent the County out of the Freeholders who shall actually and in fact reside within such district." [74]

No such provision was included in Draft B nor in the final draft. This constitution made provision for a senate to take the place of the legislative council. An attempt was made to limit the senators to residence in their districts.

[72] Shonnard-Spooner, History of Westchester County, 266.
[73] Alexander, I; Chap. II.
[74] Lincoln, I, 505.

"And this convention do ordain that no freeholder shall be eligible to the office of senator in any other of the great districts than the one in which he shall usuall and in Fact reside. . . ."

This, like the similar provision for representatives, was not included in the final draft.

The question of residence as a qualification for representatives was apparently never raised in the constitutional conventions of 1801[75] and 1821. The constitution of 1821 did establish a residential qualification for electors however. All property qualifications for electors were removed by an amendment in 1826,[76] while property qualifications for certain office holders were not removed until 1845 by amendment.

In the convention which drafted the constitution of 1846 there was long and earnest debate over the proper method of dividing counties into assembly districts. Rhoades, of Onondaga, proposed that

. . . "members of assembly may be chosen from any portion of the county in which such districts are situated, but shall be resident of the county."

He admitted that at the time while there was no law on the subject the custom of not going outside the county had acquired the force of law. Nicholas, of Ontario, said that,

"If the Constitution sanctions the selection of candidates out of the districts where they are to be voted for, it must defeat the principle objects of the single district system, which are to prevent political combinations in large counties, and to bring the candidate and his constituents nearer together, so that candidates may be generally known within their district."

The Rhoades proposition was defeated. The reason for the refusal of the convention to act upon it is not evident but the probability is that the situation was as follows: Men were usually chosen from their districts; the refusal to establish a definite rule on the subject was not to continue the

[75] To this convention Aaron Burr of New York City was chosen a delegate by Orange County. (Lincoln, II, 132.)

[76] Lincoln, II, 7.

privilege of non-residence representation but because the convention felt that custom was strong enough to regulate the matter.

The constitution framed by the convention of 1867 was not ratified by the people at the polls. Although it never came into effect it contained one section bearing on this subject. As finally submitted to the people Section I, Article III, read:

"The legislative power shall be vested in a senate and assembly. Any elector shall be eligible to the office of senator and member of the assembly."

Edwin A. Merritt, who proposed the last sentence of the section, gave as his reason that he wished to make clear that any elector was eligible to be elected to the offices mentioned in any part of the state.

The Constitutional Convention of 1872 proposed several amendments to the existing constitution of the state which, after being slightly altered by the legislature, were ratified in November, 1874. One of the amendments changed Article III, Section I, which was the section on "Legislative Power". The convention considered the subject of qualifications for assemblymen and senators including propositions that no person should be eligible except an elector, a male citizen, and a citizen of the United States; and that he should have attained a certain age. The question of a residential qualification was not considered. None of the above proposals was adopted, and the article finally submitted to the voters contained no qualifications whatsoever for either office.

The Constitutional Convention of 1894 drafted the constitution which is now in force except as it has since been amended. Article III, Section III, of this provides for senatorial districts and Section V for assembly districts. Neither article contains a requirement that a senator or assemblyman shall live in his district.

New York stands practically alone among the states of the Union in the lack of a residential qualification for both senators and representatives. The status of the matter at

present is exactly that found in an opinion of the attorney general of the state growing out of a contested election case in 1858.

In that year James Dolan contested the seat of John G. Seeley, elected from the fourth Assembly District in New York City, on the ground that Seeley was a non-resident. While the committee was taking testimony on the question as to the fact of residence or non-residence, the assembly asked Attorney-General Lyman Tremain for an opinion on the subject of residence as a qualification for representatives. In the meantime the committee had decided that Seeley was a resident of his district as the term was used

. . . "in all statutes upon the subject of elections and qualifications of voters." [77]

A minority report was brought in in the Seeley-Dolan contest which declared that three years prior to the election Seeley had moved his family to Washington County and that their permanent home had been there since. The report continues:

"Now the structure of our republican form of government or system depends, . . . upon the representations of certain portions of the State, by persons identified with the interests of such portions; and for this reason, the Constitution has apportioned the entire State into districts, giving to each its proper delegate, in order that through such delegate, the local wants and rights of the district should be properly represented in the State Legislature. If it had been of no importance that each district should be thus separately and peculiarly represented by its own local citizens, then the Legislature might as well be elected upon a State ticket, and the members taken indiscriminately from any and all sections, and a merchant doing business in New York, may be chosen to represent the farming interests of Washington County, or the fishing interests on our lake shores." [78]

Because of the decision of the committee regarding Seeley's residence the attorney general's opinion did not affect the decision of the assembly on seating Seeley. But since, as we

[77] Assembly Documents 1858, Vol. IV., No. 95. Testimony of witnesses as to Seeley's residence can be found in Assembly Documents, 1858, Vol. IV, No. 101.

[78] Assembly Documents, 1858, Vol. IV, No. 97.

have already stated, the present status of the question under consideration is covered by this opinion, just as though it had been delivered this year we will close our study of New York with it.

"A disqualification to hold any particular office should be expressed, in explicit terms, either in the constitution or laws of the State, or follow by necessary implication for what is declared. Whenever residence in the locality from which the officer to be elected is chosen is essential, it is usually declared to be a necessary qualification in unequivocal language; thus, we have a statute providing that no person shall be eligible to any town office unless he shall be an elector of the town for which he shall be chosen. This provision, of course, renders it necessary that he should be a resident of the town at the time of his election.

"In cases of sheriffs, clerks of counties, district attorneys, judges of county courts, recorders of cities, and other officers particularly named in the statute, they are required to reside within the cities or counties for which they shall be respectively appointed or elected.

"We have also a general statute declaring that no person shall be capable of holding any civil office in the State, unless at the time of his election, or appointment, he shall have attained the age of twenty-one years, and shall be a citizen of this state.

"It is further provided by general statute, that every office shall become vacant whenever the incumbent shall cease to be an inhabitant of the State. . . .

"The Constitution provides for the apportionment of the members of Assembly among the different counties . . . but seems to be entirely silent in reference to the qualifications of such members in regard to residence or any other particular. Nor is there any statute of the State that I have been able to discover, providing . . . that the member of Assembly shall reside within the district for which he shall be elected.

(In the next paragraph he refers to the fact without mention of name that Martin Van Buren, a resident of Albany, represented Orange County in the Constitutional Convention of 1821.)

"The office of member of Assembly is not a local office, but on the contrary the duties of the office may be discharged beyond the limits of the district from which the member is chosen.

"It is my opinion that there is nothing in the Constitution or laws of this state which prohibits the people in any assembly district from electing a member to represent them in the assembly of this State, who resides in another Assembly district, providing he is of age, a citizen of the state, and not otherwise disqualified.

LYMAN TREMAIN,
Attorney-General." [79]

So many elements have entered into this study of New York that are different from those affecting the New England States that it will be well to summarize them briefly.

The manorial tradition and the pernicious practice of the granting of great patents by the governor were peculiar to New York. As a result of this wealthy merchants and traders soon came to hold great estates along the Hudson and even back from the Hudson as the power of the Indians gradually decreased. Then New York was a typical royal province. It might be within the bounds of truth to say that the king, formerly the proprietor, sought to make it the *model* colony. Anyway, the similarity of its social, commercial, and political life to that of England in contrast to that of the corporate colonies of New England, is striking.

These two factors taken together give one the setting for the study of a residential qualification for representatives. The whole contest which has been given at length above was between the large landowning class and the wealthy merchant class, often one and the same, on the one hand, and the smaller landholding freemen of the rural communities, on the other. The former class held to the English belief and custom that ownership carried with it residence; in other words that legal residence and actual residence were two quite different terms, yet one kind carried with it all the privileges of the other. This view is set forth in full in the petition of the freehloders of Livingston Manor, given on pages 115-117.

The intent of the law on the subject is quite clear. There certainly is no doubt that the Act of 1699 meant to restrict the right of representation to actual inhabitants of a

[79] Assembly Documents, 1858, III, 54.

manor, county, or borough. This act remained the law of the province to the end of the colonial period yet it was continually violated just as in England during the same period, no attention was being paid to the Act of 8 Henry VI, which established a residential qualification for members of the House of Commons. The petition of Livingston Manor already referred to states that down to that date the journal of the assembly showed twenty-one examples of non-residence representatives. Futhermore, that their own manor, except for three instances, had been represented for fifty-three years by a non-resident. Yet we have found during the whole eighteenth century only five cases of members of the assembly being challenged and unseated because of non-residence. On the other hand we had the example given above (Gabriel Ludlow, 1743) of the assembly seating a man who was a non-resident and whose seat was challenged by a resident.

It seems quite evident that every case of dismissal from the assembly for non-residence was purely partisan action. Whenever one faction wished to get rid of a particularly obnoxious member of the opposite faction they could always invoke the law of 1699—given two things—first, a clear majority of the assembly, and second, the intended victim happening to be representing a community where he did not reside. For example, of the five contested cases given two of them were in 1701 and two in 1769, in both of which assemblies partisan feeling ran high.

In the charter colonies we have found that the men chosen as non-resident representatives were often holding other high colonial office. There was not nearly so much of this in New York, and the reason is, of course, that in the latter province all such men were royal appointees. There was a law passed quite early denying the right of a seat in the assembly to a provincial officeholder. It was frequently violated but almost never without protest.[80]

[80] In 1750 Colonel Lewis Morris sought to oust Peter DeLancey as a representative from Westchester, as he was at the same time a judge of the Supreme Court. This attempt was unsuccessful (N. Y. Col. Docs., II, 282). But in 1772 Robt. R. Livingston, a judge of the Supreme Court, was refused a seat as the representative of Livingston Manor. This happened again in 1774.

In closing the study of New York let us note that the division between New York City and the balance of the state in the assembly, a division which is more marked than in any other state of the union, is not of recent origin.

Every definite example of non-resident representation which we have been able to find shows the non-resident to have been a New York City merchant. In practically every vote in the assembly on the question of non-resident voting or non-resident representation we find the New York City delegation voting solidly in favor of each. The attitude of the prominent and politically powerful men of the city is shown above (p. 120) in the reasons given by Councilor Smith for his opposition to the election act introduced by De Lancey in 1769. Evidently the city, or at least certain classes of the city, felt that a resident of the city chosen to represent some outlying county or borough where he owned property could not forget the interests of the city where he actually resided while representing the town, county, or manor where he "legally" but not "actually" resided. And furthermore, that every such representative made up for the disproportionate representation which the city had considering the amount it paid in taxes.

The situation at present is as we have shown, that New York has no residential qualifications for its assemblymen or senators. The custom that a man must actually live in the district he represents, with the possible exception of the large cities where the line between assembly districts does not stand out with the prominence of a county boundary, in all probability controls the electors with all the force of law. The absence of a definite statute is a fine example of the tenacity with which a long established political tradition clings to and molds our political expression and practice.

NEW JERSEY

THE political history of New Jersey so far as this study is concerned divides itself into four distinct parts.

(1) The period of union from the granting of the deed of release by the Duke of York to Berkeley and Carteret in 1664, to the division of the province by the Quintipartite Deed in 1676.

(2) The independent existence of East Jersey between the above date and the incorporation of New Jersey with the New York government in 1702.

(3) The independent existence of West Jersey for the same period.

(4) The surrender of the province in 1702 by the proprietors of both East and West Jersey and the inclusion of the united province under the authority of the royal governor of New York.

A reading of the colonial records of this province gives one the impression that its political life was marked by greater turmoil than that of perhaps any other colony or province. If this be true it was undoubtedly due to three things.

First, the assumption of governmental authority by the original proprietors, Berkeley and Carteret, and by their assigns.

Secondly, the presence of so many Quakers in the province and among the later proprietors. The effect of this situation is easily seen when one remembers that during a large portion of the colonial era matters of defence, so called, occupied to a large degree the attention of colonial legislatures.

Thirdly, during the later provincial period the growing contest between the proprietors and anti-proprietors as the latter continually increased in number.

The whole character of early New Jersey history is determined, as Osgood points out, by the fact that the continued assumption and exercise of political authority by Berkeley and Carteret practically gave them possession of it, although the right to exercise it was challenged from many quarters.

The fault of the whole matter seems to lie in English officialdom. The deed of release[1] from the Duke of York to Berkeley and Carteret in 1664 certainly gave them, on the face of it, governmental powers. So did his deed of release of July 29, 1674, granted after the reoccupation by the English; for the wording was the same as in the earlier deed. This last deed was given only to Carteret, for in the meantime Lord John Berkeley had sold his half to John Fenwick in trust for Edward Byllinge.[2] This was the first of a number of divisions and subdivisions which finally resulted in New Jersey having what might be called a surplus of proprietors.

The duke's second deed to Carteret was given as stated above on July 29, 1674, despite the fact that Andros had been appointed governor of New York and New Jersey on July 1, 1674.[3] Thus, within the same month two governmental bodies had been established over the same territory. But legally, it seems that the leases and releases of the Duke, despite their plain wording, were nothing but deeds for land. Under the English law, the Duke of York, or anyone else, could not transfer governmental power to others; its only source was the crown. It was this interpretation of the leases which accounts for Andros' attempt to exercise political control over the Jerseys. Another cause for political dissension within the province was the circumstances attending the settlement of the towns of the Monmouth patent.[4]

Acting under what they presumed was their right, Berkeley and Carteret set up a government in their new province by the promulgation of the Concessions and Agreements[5] in 1665 and by the appointment of Philip Carteret as governor and a little later by the appointment of six councilors. The main points of the "Concessions" were:

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[1] Leaming and Spicer, 8.

[2] N. J. Archives, I, 237, 326; XXI, 559. [3] *Ibid.*, I, 156.

[4] The deed for this settlement had been given by Governor Nicolls and both deed and settlement antedated 1664. The towns of this patent claimed to be an independent jurisdiction. The first assembly in New Jersey was held here in 1667. Deputies were present from Middletown, Shrewsbury and Portland Point (Highlands of Navesink). The assembly was called "The General Assembly of the Patentees and Deputies". It met for several years but exercised local functions only. See paper on Monmouth County during Provincial Era by Hon. Joel Parker, 2 Proc. N. J. Hist. Soc., III.

[5] Leaming and Spicer, 12-26.

(1) Government of the province to be exercised by a governor, council and general assembly.

(2) The general assembly to be composed of governor, council and a representative body chosen as follows:

"That the inhabitants being freemen,—do as soon as this our commission shall arrive—make choice of twelve deputies or representatives from amongst themselves; who being chosen are to join with the said Governor and Council for the making of such laws, ordinances and constitution as shall be necessary for the present good and welfare of the said Province.

But as soon as parishes, divisions, tribes and other distinctions are made, that then the inhabitants or freeholders of the several respective parishes, tribes, . . . do . . . annually meet on the first day of January, and choose freeholders for each respective division . . . to be the deputies or representatives of the same which body of representatives or the major part of them, shall with the Governor and Council aforesaid, be the General Assembly of the Province." [6]

(3) Assembly empowered to appoint times of its meetings and adjournments.

(4) Empowered to enact all laws provided that they be consonant to reason, agreeable to the laws and customs of England and not against the interests of the proprietors.

(5) Laws to remain in force one year while under consideration by the Proprietors.

(6) Assembly given power of taxation except over the lands of the Proprietors before settling.

The first assembly held under the authority of the "Concessions" of 1664 was in May, 1668. It met at Elizabethtown: the following towns sent representatives: Bergen, Newark, Elizabethtown, Woodbrdge, and the towns of the Monmouth patent.

Another session was held in November at which appeared two representatives from "Delaware River" in addition to those who were present at the May session. The towns of the Monmouth patent chose two representatives but instructed them not to take the oath unless it contained a reservation recognizing the validity of Nicoll's land grants.[7]

[6] Leaming and Spicer, 14-15.

[7] The towns explained the appearance of their representatives at the first session by saying the men who pretended to represent them had no authority to do so but had been chosen by some of their friends (Middletown Town Book).

These representatives were not seated. Only a few laws were passed by this assembly, none of which affects this study. Assemblies also met in 1671 and 1672 but we have no record of their proceedings. This brings us to the close of the first period of united government. The division into East and West Jersey became operative immediately after the English re-occupation of 1674, although the official separation by the Quintipartite Deed was not until two years later.

East Jersey

When Philip Carteret returned from England in 1674 as governor of East Jersey, his instructions[8] declared, among other things, that the governor and council should have the power of admitting freemen; that to governor and council belonged the power of summoning and adjourning the assembly; and that the general assembly should continue to sit as two houses.[9] This was a great strengthening of executive power. Conditions in the province now became more settled due in part to a letter from Charles the Second, commanding all parties to yield obedience to the governor, and in part to an opinion from England, signed by eight prominent lawyers, unfavorable to the Nicoll's patentees.[10]

From 1674 to 1680 Carteret was in a constant struggle with Andros who was seeking to assert his authority over the Jerseys. The latter so far succeeded that at one time he had Governor Carteret arrested and taken to New York as a prisoner. In the fall of 1680 a release was issued to the proprietors of both Jerseys. This granted to them the free use of all waters and all the

. . . "powers, authorities, jurisdictions, governments, and other matters and things whatsoever." [11]

This lease, like the ones which had gone before it, was invalid,

[8] N. J. Arch. I, 167-173.

[9] In a document dated 1672 signed by Carteret and Berkeley and which professed to declare their "true intent and meaning in granting the concessions," provision was made for the assembly to sit separately from the governor and council and giving the latter the power of summoning and adjourning. Some inhabitants complained that this document altered the concessions in important particulars. It did that very thing. Leaming and Spicer, 33, 34.

[10] N. J. Arch., I, 154.

[11] *Ibid.*, I, 324, 337.

but it was recognized by Andros, and so for a time East Jersey had peace with its nearby neighbor on the east.

Just at this time East Jersey was sold at auction by the trustees of Sir George Carteret to William Penn and eleven associates. The number of proprietors, by later transfers, was soon increased to twenty-four.

"No province except East Jersey, after the process of settlement progressed so far, was subjected in this sudden fashion to such a change of rulers." [12]

With the change of ownership came a change in the theory of provincial government, if not in actual practice. The new plans show plainly the ideas of Penn and of his Quaker associates regarding the right of the individual to a free participation in the government under which he lived.

The Fundamental Constitutions[13] of 1683 were never put into effect, but it is worth while to note the provisions of this. The province was to be governed by a great council consisting of the twenty-four proprietors and one hundred forty-four representatives elected by the *freemen* of the province.

"The persons qualified to be freemen, that are capable to choose and be chosen in the great Council, shall be every planter and inhabitant dwelling and residing within the Province, who hath acquired rights to and is in possession of fifty acres of ground and hath cultivated ten acres of it; or in boroughs, who have a house and three acres; or have a house and land only hired, if he can prove fifty pounds in stock of his own." [14]

No serious attempt apparently was ever made to put this plan in force. It may have been, and probably was, unwieldy. Besides, the inhabitants had a system which was working and under which each freeholder had a voice in the government.

During the period of independent existence there were nine assemblies or at least nine sessions of the assembly.[15] The acts of none of these affect the subject of this study until we come to the session of 1698. In that year a law was passed entitled

[12] Osgood, II, 191.
[13] Leaming and Spicer, 154, 155.
[14] *Ibid.*, 155.
[15] *Ibid.*, 93-137; Mulford, 162-256.

. . . "An Act declaring What Persons are disabled from being either elected or serving as Deputies, or Representatives in General Assembly." [16]

The first part of this made it impossible for a member of the council or a proxy or agent for a proprietor to be chosen as a deputy or representative. Then the act continues:

"And be it further enacted by the authority aforesaid, that no person chosen as deputy or representative, shall serve for any other place, but that where he and his family resides. . . ."

Another act of this same session was in fact a declaration of the rights of the people of East Jersey. This act after stating that the supreme legislative power of the province rested in the governor, council

. . . "and the people by their chosen representatives in General Assembly"

provided further—

"That all the freeholders inhabiting in every of the respective towns or divisions within this Province, shall annually meet on the first Tuesday of January, and chuse freeholders, inhabitting therein, to be the representatives of the same for the ensuing year. And that there shall be a General Assembly held every year within this Province to meet in the last Thursday of May, by proclamation at Perth Amboy. . . ." [17]

A later paragraph of the act apportioned the representatives among the various towns and counties.

In the above we have a definite residential qualification for representatives. Whether there had been much non-residence representation during the preceding years it is impossible to state. Not all of the lists of representatives are available and in some cases where the names of members occur the towns from which they came are not given. The fact that we find a residential qualification appearing as early as 1698 is positive proof that at the time of its adoption both proprietary and royal authority were weak and almost inoperative in the

[16] Leaming and Spicer, 367. [17] *Ibid.*, 368, 371.

province; in other words the province of East Jersey during the latter part of its separate existence was practically independent in all but name. The reason for the above statement is the fact, as exemplified in later New Jersey history and in New York, that whenever the proprietary or royal government was strong and was being administered by alert and capable men all efforts on the part of the people to have their representatives chosen from a limited area where their chief interests lay always met with opposition.

West Jersey

In taking up the study of this province we find in the Concessions and Agreements of 1677[18] an elaborate plan of government more democratic than that of the corporate colonies of New England. Some students feel that this plan rather than that set up in Pennsylvania reveals the political ideas and ideals of Fox, Penn, and other leading Friends. The full title of this plan of government was

. . . "The Concessions and Agreements of the Proprietors, Freeholders and Inhabitants of the Province of West New Jersey in America"

and it was signed by the proprietors and a large number of freeholders and inhabitants on March 3, 1677. Chapters XXXII to XL deal with the powers of the general assembly. The first chapter referred to reads in part:[19]

"That so soon as divisions or tribes, or other such like distinctions are made; that then the inhabitants, freeholders, and Proprietors, resident upon the said Province . . . do yearly and every year meet on the first day of October, . . and choose one Proprietor or freeholder for each respective propriety in the said Province (the said Province being to be divided into one hundred proprieties) to be deputies, trustees or representatives for the benefit, service and behoof of the people of the said Province: which body of Deputies, trustees or representatives, consisting of one hundred persons, chose as aforesaid, shall be the general, free and supream assembly of the said Province for the year ensuing and no longer."

[18] N. J. Arch., I, 241-270.
[19] *Ibid.*, I, 263.

The assembly thus provided for was to be practically absolute. In addition it was not to be chosen

. . . "by the common and confused way of cry's and voices, but by putting Balls into Balloting Boxes."

It should be noted that no particular power was reserved to the proprietors except such as would come to them as inhabitants and freeholders within the province.

As has been pointed out in connection with East Jersey the years between the division of the province and 1681 were years of contest with Andros, who was seeking to exercise authority, and did to a limited extent, in both Jerseys. The year 1681 as already stated, marks the date of the withdrawal of claims on the part of the New York governor to interfere in New Jersey affairs. That year marks the first assembly in West Jersey. Most of its acts were in confirmation of provisions of the Concessions. One act provided that there should be an annual assembly

. . . "chosen by the free people of the Province." [20]

It also provided that the assembly was not to be prorogued without its consent and that the governor must confirm its acts. The next year the assembly announced that it was its judgment and that of those by whom they were chosen that the

. . . "most regular way of preserving liberty and property"

by a lawful free assembly was

. . . "that each ten proprieties, chuse their ten representatives where they are peopled." [21]

This is ambiguously worded and is open to two possible interpretations. It was not an act but simply a suggestion, it seems to me, to the people of each propriety to choose residents when electing representatives. Mulford[22] (p. 239) holds this view and says the discussion which preceded it was over the comparative advantages of direct and general elections.

The Assembly of 1683 provided for different dates of election in the different tenths.[23] Such an arrangement as

[20] Leaming and Spicer, 423.
[21] *Ibid.*, 443.
[22] A Civil and Political History of New Jersey.
[23] Leaming and Spicer, 473.

this was always for the convenience of the non-resident voter. This same assembly provided that thereafter all civil officers of the province, including governor and councilors, were to be chosen by the assembly.

In 1686 the assembly gave each proprietor one proxy in the assembly provided the proxy resided on the proprietor's land. No further act appears which bears even indirectly on this study, until in 1694 when the basis of election was changed from tenths to counties. Representatives were apportioned among the counties; electors were to be freeholders within their respective counties and the qualifications for representatives were that they be

. . . "good and sufficient men." [24]

A later enactment required that they also be freeholders and provided for a different election day in each county.[25] In an act of 1699 the counties were mentioned by name with the number of representatives to which each was entitled. The qualifications of electors was

. . . "all sufficient freeholders and no more." [26]

A law in 1701, however, went back to the former provision found in the law of 1694. As the separate existence of West Jersey come to a close the only reference we have found to a residential qualification was in the suggestion made by the assembly of 1682. As in the case of East Jersey it is impossible to tell whether non-resident representation was practiced. We have the names of the members of several assemblies but not the names of the divisions from which they came. Three things make it probable that there was little or no non-residence representation in West Jersey. These three things are:

(1) The absence of any large towns in the province.

(2) The Quaker belief in each individual's right to a share in the government.

(3) The absence of proprietary pressure exerted politically in order to safeguard proprietary authority.

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[24] Mulford, 269. [25] Leaming and Spicer, 533. [26] *Ibid.*, 568.

It is not within the province of this study to enter into the factors bringing about the transfer of the proprietary government in New Jersey to the crown. Suffice to say that the negotiations continued for two or three years and when the proprietors were satisfied that their property rights in the province would be respected they surrendered their claim to governmental power. The official Deed of Surrender[27] was dated April 15, 1702. Thus was New Jersey added to the growing list of royal provinces.

Efforts were at once made by each of the different factions which had divided New Jersey to have one of its members appointed governor. The Lords of Trade, very wisely, advised that some one who had in nowise been connected with the disorders in the province, be appointed. So Lord Cornbury, who had already been commissioned as royal governor of New York, was also commissioned as the first royal governor of New Jersey. This appointment of a joint governor for the two provinces continued until 1738. Lord Cornbury's instructions,[28] dated November 16, 1702, confirming him as

. . . "Our Captain General and Governor, in Chief in and over our Province of Nova-Cæsarea, or New Jersey",

ordered that

. . . "with all convenient speed, you call together one General Assembly . . . ; and that the said General Assembly do sit in the first place at Perth Amboy, in East New Jersey, and afterward the same, or other the next General Assembly at Burlington, in West New Jersey; and that all future General Assemblies do set at one or the other of those places alternately. . . .

"And our further will and pleasure is, that the General Assembly so to be called, do consist of four and twenty representatives; who are to be chosen in the manner following, viz: Two by the inhabitants house-holders of the city or town of Perth Amboy, in East New Jersey, two by the inhabitants house-holders of the city and town of Burlington in West New Jersey; ten by the freeholders of East New Jersey, and ten by the freeholders of West New Jersey; and that no person shall be capable of being elected a representative by

[27] Leaming and Spicer, 609-618. [28] *Ibid.*, 619-646.

the freeholders of either division, or afterwards of sitting in General Assembly's who shall not have one thousand acres of land of an estate of freehold, in his own right, within the division for which he shall be chosen; and that no freeholder shall be capable of voting in the election for such representative, who shall not have one hundred acres of land of an estate of freehold in his own right, within the division for which he shall so vote; And that this number of representatives shall not be enlarged or dimished, or the manner of electing them altered, otherwise than by an act or acts of the General Assembly there, and confirmed by the approbation of us, our heirs and successors."

It is interesting to note that the plans for the assembly outlined in the above follow in exact detail a plan proposed in the Proprietor's Memorial offering to surrender the Jerseys (1701) with the single exception that they asked for an assembly of thirty-six; sixteen from each division of the province outside the two principal towns.[29]

According to Lord Cronbury's instructions he could prorogue or dissolve the assembly. He also had the power of veto, which power the proprietors also reserved.[30] There was a property qualification for both electors and representatives and the only additional qualification for representative was that his freehold must be in the district represented. In practice this method was not at all satisfactory to the constantly increasing anti-proprietary party or faction. Under it the election in each division was held at only one place—a fact which disfranchised many eligible freemen and enabled a few men to choose the representatives for the division. For example, in the December election of 1703 in East Jersey, the anti-proprietary interests determined to carry the day and so they appeared at the chosen place to the number of three hundred. On the other side forty-two qualified voters, most of them from New York and Long Island, appeared. Despite the discrepancy in numbers the sheriff, Thomas Gordon, returned the representatives chosen by the forty-two.[31] Also it was frequently charged and apparently with

[29] Leaming and Spicer, 599-602.
[30] *Ibid.*, 650, 651.
[31] N. J. Arch., III, 14-15.

truth, that in West Jersey the Quakers continually dominated the elections although outnumbered in the province except in Burlington County.[32]

Soon after his first visit to the province Cornbury placed himself in opposition to the proprietary party. The first session of the first assembly under the new government met in 1703. This contained a proprietary majority.[33] The second session of the same assembly met in September, 1704. This also had a bare majority for the proprietary party, despite the efforts of Cornbury and his friends. Friction soon developed between the governor and the members of the assembly over their dilatoriness in providing for the defence of the province, so the governor dissolved it and issued writs for a new one to meet in November, 1704.[34]

When the assembly met the governor refused the oath to three members from West Jersey. This gave the anti-proprietary party a majority and thereby the power to pass an election act which they hoped would gain permanent control of the assembly for their party. This act abolished the election of ten men at large from one division at one point. Instead representatives were apportioned among the towns and counties. Qualifications for representatives were that they must be inhabitants and freeholders of the division for which they were chosen and freeholders of the county whence they were elected.[35] Here was a distinct step toward a more democratic government; yet a step made possible by the use of means in themselves low and unworthy.

The reaction of the proprietary party to this law was true to form. Whenever any propertied interest in the colonies objected to the growth or extension of the power of the provincial assembly, the objection nearly always rested on English law and English practice as a precedent. And so it was in this case. The West Jersey proprietors sent a memorial to the Lords of Trade objecting to several of Cornbury's acts, among them his refusal of the oath to three representatives

[32] For the ability of the Quakers as practical politicians, see N. Y. Col. Docs., IV, 1148, 1171; V, 34.

[33] Tanner, 307. [34] Mulford, 291. [35] Laws Enacted in 1704 (Bradford Prints).

and his approval of the new election act. After expressing doubt whether the assembly had the authority to alter the qualifications of electors and representatives, they point out that the qualifications according to their former law were

> ". . . a standing and unalterable part of the constitution of England, where the electors of knights of the counties must have a fixed freehold; and the elected are generally the principal landed men of their respective counties; but the alteration now made, was intended to put the election of representatives into the meanest of the people, who being impatient of any superiors, will never fail to choose such from amongst themselves, as may oppress us, and destroy our rights." [36]

It looks very much as though the initiative in passing a new election act was taken by the governor rather than by the assembly. In June, 1704, Cornbury recommended to the Lords of Trade a change in the property qualifications for electors and representatives on the ground that some men who had one thousand acres of land were illiterate, while there were other very able men with equal wealth but having none of it, or only part of it, in land. He also pointed out that when the elections were held in only one place in each division of the province, it necessitated some men traveling two hundred miles to vote.[37]

In February, 1705, Cornbury wrote to the Lords of Trade commenting on the laws passed the previous year and urging their approval. The reasons he advanced for the approval of the election act were the same as those stated in his letter of June, 1704, to the same body. The act, however, was not approved being in all probability too democratic for the queen's advisers.[38] Cornbury's reasons for approving the act in question were weighty enough and they must have impressed the Lords of Trade for in April, 1705, that body recommended to the queen that additional instructions be issued Cornbury dealing with the question of the provincial assembly.[39]

[36] Smith, History of New Jersey, 341.
[37] N. J. Arch., III, 54.
[38] *Ibid.*, III, 68.
[39] *Ibid.*, III, 96.

This recommendation was favorably acted upon and the additional instructions reached Cornbury in the spring of 1705.[40] According to these two representatives were to be chosen by the inhabitant householders of Perth Amboy and two by the freeholders of each of the five counties of East Jersey. In the west division two representatives each by the inhabitant householders of Burlington and Salem and two each by the freeholders of the four counties of West Jersey. It will be noted that this divided the province equally, giving each division twelve representatives. A definite property qualification was restored but was reduced so as to require of an elector one hundred acres of land or a personal estate of £50 sterling. To be chosen a representative one must have a freehold of one thousand acres or a personal estate of £500 sterling. Nothing, of course, was said regarding the question of residence. In view of the insistence of the crown in drawing up the framework of the representative system in the province it is hard to understand the clause in the above instructions which seems to give the assembly a free hand in altering it, or at least in suggesting alterations. The clause referred to was one which stated that no act affecting the number of representatives or the method of their choice should be operative except by action of the assembly with royal approval. Five years passed before the assembly used the right granted by the clause to which reference has just been made. Cornbury had been replaced as royal governor by Lovelace, whose instructions on the subject of the assembly read exactly as did the additional instructions given Cornbury.[41] The assembly which met Lovelace in March, 1709, contained a proprietary majority, yet a step forward was taken in an act passed June 4, specifying the qualifications of electors and representatives. The preamble stated the reason for its passage to be that the

. . . "present Constitution granted and allowed by our Sovereign Lady the Queen,"

had been found inconvenient.

[40] N. J. Arch., III, 96-98.

[41] *Ibid.*, III, 318.

Section one defines the qualification of an elector as

"One Hundred Acres of Land in his own Right or be worth Fifty Pounds, current Money of this Province in Real and Personal estate."

In order to be chosen a representative one must have

"One Thousand Acres of Land in his own Right, or be worth Five Hundred Pounds, current Money. . . ."

Sections two and three apportioned the representatives among the cities, three in number, and the nine counties into which the province had been divided by this date. Section four in full reads:

"And be it further Enacted by the Authority aforesaid, That all or every Person or Persons, elected and chosen Representatives for the Counties aforesaid, shall be Freeholders in that Division for which he or they shall be chosen to serve in General Assembly, as aforesaid; and that no Person who is not a Freeholder shall be capable of electing or or being elected, nor of sitting in General Assembly." [42]

It will be noted that the principal change made by this act was the change of the word "sterling" to the phrase "current money of the province" in stating the personal estate requirements.

The act of 1709 never before operative for the simple reason that it and all the other acts passed at the same session disappeared somewhere between the printer in New York City and the New Jersey provincial officer whose duty it was to send the laws to England.[43] Whether there was any connection between the disappearance of the above act and the passage of the one on the same subject the following year is not clear. Something, however, led the assembly which met Ingoldsby, in November, 1709, to pass a law which laid down a strict residential requirement and one which was far reaching in its effect. This assembly was anti-proprietary, which partially or perhaps entirely, accounts for the new law which was passed in January, 1710.

[42] Acts of General Assembly of New Jersey, 1702-1776, 6-7 (Allinson).

[43] N. J. Arch., IV, 45. Suspicion pointed to Bass as having deliberately destroyed the acts.

From the preamble it is plain that the condition calling forth this law was one which we have not met in any other colony so far in this study. That is, the possibility of a large landholder, although a resident of another state, being elected to the assembly. The preamble states the problem so concisely we will quote:[44]

"Whereas nothing can conduce more to the Honour, Safety and Advantage of this Province, than the Members elected to serve in the General Assembly be perfectly acquainted with the true State and Circumstances of this Province; and many Inconveniences may arise by electing Persons to serve in the said General Assembly who inhabit in another Province, although they may have some Interest or Estate in this, but their Concerns lying and being in Some of the neighboring Provinces, where they with their Families do inhabit, they may thereby be swayed to have greater Regard to the Interest of the Province in which they so inhabit, than for the Welfare and Prosperity of this.

"Be it Enacted . . . That . . . no Person shall be capable of being elected a Representative to serve for any City, Town or County, in the General Assembly within this Province, who is not inhabiting and usually resident himself, and likewise with his Family (if any he hath) the Day of the Date of the Writ of Summons, and hath been so Three Months before in some City, Town or County of that Division in which he shall be elected."

The next and last section retained the freehold qualification for representatives of the act of 1709.

Robert Hunter was appointed governor late in 1709 but did not arrive in the province until June, 1710. When his instructions were drawn the election act of January, 1710, had either not been received in England or else it was ignored, probably the former. The portion of the "instructions" relating to the assembly was exactly the same as in Lovelace's. In a letter which accompanied the instructions the Lords of Trade said they had no objection to the act (the Cornbury Act of 1704) altering the constitution and regulating the election of representatives except it did not contain a definite property qualification. In this connection the governor was

[44] Acts of General Assembly of New Jersey, 1702-1776, 10-11.

given the authority to reduce the freehold requirement if after reaching the province he felt it to be too high.[45]

Hunter met his first assembly, which was a proprietary one, in December, 1710, and succeeded in getting an act through the assembly which conformed more nearly to the royal instructions than did those of 1709 and 1710. The council would not agree to the new act, however, so the one of 1710 remained the law of the province. In Hunter's letter to the Board of Trade, telling of his attempt and failure to get a new election act we get some important information from the standpoint of this study. It reads in part:[46]

"The Act for regulating Elections and assertaining the Qualifications of the Representatives of this Province. This Act tho founded upon and conformable to an Instruction of Her Majesty for this Purpose was Rejected, because repugnant to an Act past in Coll. Ingoldsby's time, which act as they themselves owne was made on purpose to exlcude Doctor Johnston and Captain Farmer from being Elected: These Gentlemen at that time living by chance in the province of New York, tho their Estates, which are very valuable, lye in the Jerseys, and who have acted very zealously, and strenuously for her Majesty's service."

It seems that when Ingoldsby sent the acts passed by the assembly in 1710 to England he did not comment on them as each royal governor was supposed to do. So the Lords of Trade asked Hunter's opinion on them. He rendered this in the same communication referred to above. In regard to the election act of 1710 he said:

"This was levelled particularly against Captaine ffarmer and Doctor Johnston men of the best Estates and ability in this Province, and who have been very active and usefull in Her Majesty's Affairs, and may deprive us of more such and is contrary to that Constitution of Assembly appointed by Her Majesty upon the surrender & confirmed by all her subsequent Instructions, obliging the elected to an actual residence, whereas the Instructions mentions no other qualification but an Estate to a certaine value within the Division." [47]

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[45] N. J. Arch., IV, 2, II (Note).

[46] N. Y. Col. Docs., V, 201; N. J. Arch. IV, 55.

[47] N. Y. Col. Docs. V, 207.

While stating his objection to the law in question it is significant that Hunter did not recommend its rejection. He was having a far more harmonious administration than any of his predecessors and though he had scarcely been in the province a year he had probably sensed the popular demand for a law containing a residential requirement. There is no record of royal approval of the election act of 1710 but neither was it vetoed. That it was considered the law of the province from the date of its passage is shown by its inclusion in the earliest collection[48] of provincial laws.[49] So we can say that 1710 marked the end of non-residence representation in New Jersey. To close our study of this province it only remains to see to what extent non-residence representation was practiced during the period from 1703, when the province was reunited and 1710 when the non-residence representation law was passed.

During that period five assemblies met, holding eleven sessions. In the second assembly, which met in 1704, one of the representatives for the eastern division was John Royce[50] a merchant of New York City,[51] who owned a large tract of land on the Raritan. In the third assembly in 1707, Lewis Morris and Thomas Farmer both appear as representatives for the eastern division.[52] Morris' legislative record in New York we have already noticed in our study of that province. Farmer, according to the letter of Governor Hunter already quoted, was also a resident of New York.

Royce and Farmer were both members of the fourth assembly, which met in March, 1709.[53] This brings us to the fifth assembly, the one which passed the non-residential act. The assembly journal does not give the list of members, but from the reasons given for the passage of the law we have every reason to assume that Farmer and Dr. John Johnstone had been returned as representatives. Farmer's residence has already been noted but Dr. Johnstone is hard to place.

[48] Allinson.

[49] The next Election Act in New Jersey in point of time was one in 1725 which abolished non-residence voting. (Allinson, p. 69.)

[50] Assembly Journal, 41.

[51] Tanner, 310.

[52] Assembly Journal, 77.

[53] *Ibid.*, 157.

He was a large land owner near Perth Amboy and there is evidence that he had lived there prior to this date. On the other hand we have Governor Hunter's statement that at the time of the passage of the non-residence act he was living in New York City. He evidently moved back and forth between the two provinces, for he was Mayor of New York City in 1715, but in 1720 was removed from the Provincial Council in New York because for two years he had been a resident of New Jersey.[54]

In the study of New Jersey we find very little if any opportunity for the development of non-residence representation before we find a law forbidding it. This is accounted for by the fact that the province contained no one city which by its size and influence dominated its political life, and by the further fact that the unit of representation was not the county or town but the divisions of which there were only two. When the question of non-residence representation does come up it presents a phase which is entirely new. It brings us face to face with the fact that the great landowning interests were not stopped by state lines in their attempt to protect their property through membership in the assembly of the province where their property lay. And so we find able and influential residents of New York City seeking seats in the New Jersey Assembly, just as they were constantly representing outlying New York Districts in the assembly of that state. All of which was strictly conformable to English political practice of the time. But New Jersey in thus parting from English practice at this early date showed that the influence of some political ideas, sown by the Quaker proprietors years before, had borne fruit.

[54] N. Y. Col. Docs., V, 467, 649.

PENNSYLVANIA

In our study of New Jersey we noted the tendency of Quaker proprietors to let the inhabitants of their province have a much more free rein in managing their affairs than did the royal governors. We also stated that this freedom resulted in a greater democracy in provincial affairs. A study of Pennsylvania ought to show whether such conclusions were warranted; for in this province a Quaker proprietor had full and undivided authority.

Penn's authority and property rights in Pennsylvania and the territory later known as Delaware rested upon four documents.

(1) Charter from Charles the Second dated March 4, 1681, conveying Pennsylvania to Penn.
(2) Deed of release for province of Pennsylvania from the Duke of York, dated August 31, 1682. The general terms of this were the same as the charter. Penn's purpose in getting this was to preclude any possibility of a later assertion of the duke's right.
(3) Grant of Duke of York to Penn, August 24, 1682, conveying to him the town of New Castle (Delaware) and a district twelve miles around it.
(4) Grant from the Duke of York of the same date as (3) conveying to Penn a tract of land below New Castle, which was later included in the two lower counties of Delaware.[1]

During its provincial history Pennsylvania had what might be called four constitutions. They were:

(1) The Frame of Government of 1682.
(2) The Frame of Government of 1683.
(3) Markham's Frame of Government of 1696.
(4) Charter of Privileges—1701.[2]

The charter from the king to William Penn gave him the authority to call an assembly and to determine its form and the qualification of its members. In short, the proprietor was

[1] Charter and Laws, 466-467.
[2] All these can be found in Pa. Col. Recs., Vol. I and II.

given an absolutely free hand in deciding the form of government of his province. The portion of the charter in which we are interested reads:

"Know ye therefore, that wee reposing speciall trust and confidence in the fidelitie, wisdome, justice and provident circumspeccon of the said William Penn, . . . Doe grant free, full and absolute power, . . . to him and his heirs, and to his and their deputies, and Lieutenants, . . . to ordayne, make, Enact and under his and their Seales to publish any Lawes whatsoever . . . , according unto their best discretions, by and with the advice, assent and approbacon of the freemen of the said countrey, or the greater parte of them, or of their Delegates or Deputies whom for the Enacting of said Lawes, when, and as often as need shall require.[3] Wee will, that the said William Penn, and his heires, shall assemble in such sort and forme as to him and them shall seem best.[4]

Acting under the authority conferred upon him by the charter Penn drew up the first Frame, that of 1682, before he left England. It provided for an elective council, something not found in any other province or colony. That portion of the Frame relating to the council reads:

"That the freemen of the said province shall, on the twentieth day of the twelfth month, . . . , meet and assemble in some fit place, of which timely notice shall be before hand given, . . . , and then and there shall choose out of themselves seventy-two persons of most note for their wisdom, virtue and ability, who shall meet on the tenth day of the first month next ensuing, and always be called and act as the Provincial Council of the said province." [5]

It was further provided that after the first year one-third of the council should be elected annually and no councilor could serve two successive terms. No other qualification or restrictions regarding the election of council members was mentioned.

The provision regarding the assembly was:

[3] The break in the reading caused by a period at this point breaks the grammatical structure of the preceding and following sentences. The evident thought is obtained by disregarding the period.

[4] Charter and Laws, 83.

[5] *Ibid.*, 94.

"And to the end that all laws prepared by the governor and provincial council aforesaid, may yet have the more full concurrence of the freemen of the province, it is declared, granted, and confirmed, that at the time and place or places for the choice of a Provincial Council as aforesaid, the said freemen shall yearly choose members to serve in General Assembly as their representatives, not exceeding two hundred persons, who shall yearly meet on the twentieth day of the second month . . . in the capital town, or city of the said province." [6]

A later clause[7] provided that for the first year the general assembly might consist of all the freemen of the province. Provision was also made for the increase in size of it to five hundred as the population of the province increased. The division of the province into hundreds and counties and the apportioning of representatives among them was to be by the council and general assembly. All elections under the Frame of 1682 were to be by ballot.[8]

A later document dated May 3, 1682, amplified some of the provisions of the Frame.[9] It provided that all elections should be free and that the council and general assembly should be the sole judges of the election of their own members. Every freeman was capable of electing or being elected to the provincial council or general assembly. The qualifications for freemen varied, there being four different requirements: (a) Every inhabitant who was, or who should become, the owner of one hundred acres of land; (b) Every one who had paid his passage, and taken up one hundred acres of land at a penny an acre and had cultivated ten acres of it; (c) Every servant or bondsman, free from his service, who had taken up fifty acres and cultivated twenty of it; (d) . . .

. . . "Every inhabitant, artificer, or other resident in the said province, that pays scot and lot to the government. . . ."[10]

It will be noticed that while this made freemanship depend on ownership, or at least on the paying of taxes, yet it was at the same time one of the most liberal extensions of that

[6] Charter and Laws, 96. [7] *Ibid.*, 97. [8] *Ibid.*, 98. [9] *Ibid.*, 99. [10] *Ibid.*, 99.

privilege existing in any colony or province. It is especially noticeable that it took into consideration the inhabitant already in the province before it came into the possession of Penn, and the bond-servant who had completed his term of service.

Penn arrived at Newcastle on October 27, 1682, and on the next day took possession of the "lower counties" according to the Duke's deed. The next day he proceeded to the main province. Soon thereafter he divided it into three counties, Bucks, Philadelphia, and Chester. At the same time the Delaware territory was divided into the counties of Newcastle, Kent, and Sussex.[11]

Sheriffs and the other officials necessary for conducting county business were appointed and on November 18th writs were issued to the sheriffs to summon the freeholders of their respective counties on the twentieth and to elect "out of themselves" seven persons to serve as their representatives in a general assembly to be held at Upland (Chester) on December fourth.[12] The words "out of themselves" in the writs calling this election clearly limited the freemen to the choice of residents of their respective counties.

The assembly met on the appointed day. On the sixth the Act of Union annexing the lower counties was passed, and also an act naturalizing the citizens of those counties. On the next day the proprietor placed before the assembly the Frame of Government and the "Written Laws or Constitutions".[13] The latter consisted of ninety laws proposed by Penn, sixty-one of which were later adopted and were known as . . . "The Great Law or Body of the Laws of the Province of Pennsylvania."

The second one of these prescribed qualifications for electors and for representatives.

"And be it fully enacted . . . that all officers and persons commissionated and employed in the service of the government in this Province, and all Members and Deputies elected to serve in the Assembly thereof, and all that have a

[11] Proud, I, 234. [12] Hazard, 603. [13] Charter and Laws, 477.

Right to elect such Deputies, shall be such as profess and declare they believe in Jesus Christ to be the son of God, the Savior of the world, and that are not Convicted of ill fame, or unsober and dishonest Conversation, and that are of twenty one years of age at least." [14]

The next assembly met in Philadelphia, March 10, 1683. The form of writ used in calling the election for this assembly has been preserved:

"I do hereby, in the King's name, empower and require thee to summon all the freeholders, in this bailiwick, to meet on the 20th day of the next month, at the falls upon Delaware river; and that they then and there, elect and chuse out of themselves, twelve persons of most note for wisdom and integrity, to serve as their delegates, in the provincial council, to be held at Philadelphia, the 10th day of the first month next; and that thou there declare to the said freeman, that they may all personally appear at an Assembly, at the place aforesaid, according to the contents of my charter of liberties; of which thou art to make me a true and faithful return.

William Penn.

To Richard Noble, High Sheriff of
The County of Bucks; and the other five Sheriffs likewise for their several counties." [15]

By the terms of this writ the freemen of the counties were again restricted in their choice to residents and the size of the assembly was increased to seventy-two. When the assembly met, however, some of the members brought with them petitions[16] from their constituents praying that the number chosen might constitute both council and assembly, three from each county constituting the council and nine from each county the assembly. The proprietor agreed to this request and the assembly later made the arrangement permanent by an Act of Settlement.[17]

The debate attending the act mentioned above determined the proprietor to bring in a new frame of government. The very next day at a general meeting of proprietor, council and

[14] Charter and Laws, 108.
[15] Proud, I, 235.
[16] The Petition from Chester County can be found in Hazard, 603.
[17] Charter and Laws, 125.

assembly, Penn put the question whether they desired the old charter or a new one.

. . . "They unanimously desired there might be a new one." [18]

After many conferences between the proprietor, council, and assembly, the new charter (Frame of 1683) was read to a joint assembly with impressive ceremonies on April 2, 1683. It was then signed by Penn, by each person present, and was delivered to a committee of the assembly.[19]

The new "Frame", or constitution as we have called it, made several changes in the political organization of the province. The council was to consist of eighteen members, three from each county; the assembly of thirty-six, six from each county. The council and the house together were to constitute the general assembly. The residential qualifications for representatives was retained; for the instrument provided that the freemen of each county should yearly

"Choose out of themselves six persons of note for virtue, wisdom, and abilities to serve in Assemblie as their Representatives." [20]

From 1692 to 1695 Penn's authority as proprietor was in abeyance and with it the constitution of 1683. Governor Fletcher, of New York, was also appointed governor of Pennsylvania. His commission,[21] dated October 21, 1692, authorized him to appoint a council not to exceed twelve in number. The provisions of his commission regarding the assembly were those with which we are already familiar in the other royal provinces. It authorized him to

". . . summon and Call General Assemblies of the Inhabitants, being ffreeholders, within our said Province, according to the usage of our province of New York; And that the persons thereupon duly Elected by the major part of the freeholders of the respective Counties and places, and soe returned . . . sha'l be called and held the Generall Assembly of that our said province." [22]

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[18] Pa. Col. Recs., I, 63.
[19] *Ibid.*, I, 72.
[20] Charter and Laws, 158.
[21] Pa. Col. Recs., I, 352-357.
[22] *Ibid.*, I, 353.

Fletcher lost no time in setting up the royal government in Pennsylvania. He arrived in Philadelphia about noon, April 26, 1693. By afternoon he had chosen several councilors and had asked them to recommend persons qualified for judges, sheriffs, and other officials.[23] The next day more councilors were chosen, and William Markham was appointed lieutenant governor. Fletcher now asked the advice of the council as to the number of members which he ought to summon as an assembly. Some advised adhering to the constitution of the province, the charter as they called it, but the governor disregarded this suggestion and on the twenty-seventh issued writs for an assembly to meet on May 15th. Philadelphia and Newcastle were to have four members each; the other counties three each.[24]

On the first day of the assembly which met according to the above writs, opposition developed between it and the governor. While this opposition at times took on different forms the basis of it is shown by the action of the assembly, on the second day of the session. They sent a formal address to the governor asking that the

. . . "Procedure in Legislation may be according to the usual Method and Laws of this Government . . . which we humbly conceive to be yet in Force. . . ." [25]

Fletcher replied in writing the same day that,

"The Constitution of their Majesties Government, and that of Mr. Penn's, are in a direct Opposition one to the other. If you will be tenacious in sticking for this, it is a plain Demonstration, use what Words you please, that indeed you decline the other.

"Time is very precious to me; I hope you will desist from all unnecessary Debates."

The whole session was one long contest, the assembly demanding a confirmation of existing laws before it would pass a supply bill much desired by the governor. Fletcher finally yielded.

[23] Pa. Col. Recs., I, 365.
[24] *Ibid.*, I, 366.
[25] Assembly Journal, I, 68.

There was one inheritance from the Fletcher régime, however, which was a distinct forward step in the democratic government of the province. Prior to 1693 all legislation originated in the council. Under Fletcher, with an appointive council, was put into operation the plan in vogue in other provinces. Having once been given this privilege we will find later the assembly would not give it up even after the former constitution was again in force.

Penn's authority in the province was restored in 1694, and on August 20th William Markham was appointed governor. His commission authorized him to conduct the government

. . . "according to the laws and usages thereof."

He interpreted this to mean the Frame of 1683 and issued writs for the election of a council and assembly. Almost immediately upon convening the assembly asserted its right to initiate legislation. The council finally agreed and so that right of the assembly became a part of the law of the province.[26]

Markham had much trouble with the assembly over a supply bill to aid New York, so he arbitrarily dissolved it. He now changed his mind about the meaning of his commission and adopted the order of procedure of Fletcher's administration. He appointed a council consisting of twelve members and issued writs for an assembly to be composed as was the assembly which met under Fletcher, namely twenty. The assembly immediately upon convening issued a strong remonstrance;[27] at what it declared to be the governor's violation of the constitution in his issuance of the writs calling the assembly into being.[28] There thus began a contest between governor and assembly which resulted in Markham submitting some new proposals or, as he called them,

. . . "some heads of a frame of government." [29]

Within four days the assembly completed its consideration and approval of these, and a few days later the "Markham's

[26] Charter and Laws, 561. [27] Proud, I, 409.
[28] For an excellent statement of Markham's position see Pa. Col. Recs., I, 505.
[29] Pa. Col. Recs., I, 508.

Frame of Government" [30] as it was later known, became the constitution of the province.[31]

Under this both assembly and council had the power of initiating legislation. The members of these two bodies were to be chosen annually. The qualifications were set forth in the following section which said that the council and assembly should,

". . . Consist of two persons out of each of the Counties of this government, to serve as the peoples Representatives in Council, and of four persons out of each of the said Counties to serve as Representatives in Assembly. . . ."

". . . That no inhabitant of this Province or Territorities shall have right of electing or being elected as aforesaid, Unless they be free Denizens of this government and are of the age of Twenty one years or upwards and have fifty acres of land, ten acres whereof being seated and cleared or be otherwise worth fifty pounds lawful money of this government Clear estate and have been resident within this government for the space of two years next before such election." [32]

The above quotation shows that this third constitution of the province, like its two predecessors, contained a requirement that the representatives of a county must be residents of that county, the words "out of each of the said counties" being open to no other construction. Then it went still further and for the first time established a definite requirement as regards the length of required residence in the province before one was eligible to the office of councilor or representative.

Penn returned to the province December 3, 1699, and the question at once arose as to what was the fundamental law of the province. Some said Markham's Frame, others that the proprietor's return brought the Frame of 1683 into operation again. Penn's attitude was that the former had served while he was absent but that it could not bind him against his own act, that is, the Frame of 1683. The council proposed a consideration of both Frames, keeping what had proven good in

[30] Pa. Col. Recs., I, 48.
[31] Charter and Laws, 245-260; Pa. Col. Recs., I., 509; Assembly Journal, I, 94-97.
[32] *Ibid.*, 246-247.

each. As a result of the joint action of proprietor, council, and assembly, the Charter of Privileges of 1701 was agreed upon. The assembly's final action on this was on October 23, and a few days later it was signed by the proprietor and thus became the fundamental law of the province or the fourth constitution.[33] Throughout the eighteenth century until the adoption of the Constitution of 1777, this instrument was recognized as the constitution of the province.[34]

The portion of the Charter of 1701 bearing on this study reads:

"For the well governing of this Province and Territories, there shall be an Assembly yearly chosen by the Freemen thereof, to consist of four Persons out of each County, of most Note for Virtue, Wisdom and Ability . . . : Which Assembly . . . shall have all other Powers and Privileges of an Assembly, according to the Rights of the Freeborn Subjects of England, and as is usual in any of the King's Plantations in America.

"And the Qualifications of Electors and Elected, and all other Matters and Things relating to Elections of Representatives to serve in Assemblies, tho' not herein particularly expressed, shall be and remain as by a Law of this Government, made at Newcastle, in the Year One Thousand Seven Hundred, intituled, An Act to ascertain the Number of Members of Assembly, and to regulate the Elections." [35]

The words "out of each county" in the above, rather than "from each county", which we have already seen was the form used in New York, show that the residential qualification for representatives which had obtained in the province from the very first was continued throughout its provincial history. The act passed in 1700, to which reference is made in the Charter of 1701, went a little more into detail regarding further qualifications for electors and representatives. The portion of it bearing on this subject reads:

". . . That there shall be four persons elected yearly in each respective county of this province and territories to

[33] Assembly Journal, 161.

[34] The reason for such a statement is that during this period the provincial laws refer specifically to it from time to time as the constitution.

[35] Assembly Journal, I, Part II, 11.

serve as members of assembly. And that no inhabitant of this province and territories shall have right of electing or being elected . . . , unless he or they be natural or native-born subject or subjects of England, or be naturalized . . . and unless such persons . . . be of the age of twenty-one years or upwards, and be a freeholder . . . of this province or territories, and have fifty acres of land or more well seated and twelve acres thereof or more cleared and improved, or be otherwise worth fifty pounds lawful money of this government clear estate, and have been resident therein for the space of two years before such election." [36]

The above law was disallowed by the Queen in Council in 1706,[37] but another act with exactly the same title was passed by the assembly January 12, 1706. This altered the size of the assembly and gave the city of Philadelphia two representatives but stated the qualifications of representatives in exactly the same words as the former act.[38] The portion of this act which gave Philadelphia representation separate from that of its county laid down the requirement that its representatives must be residents of the city.[39] The law of 1706 met a better fate than its predecessor. It was considered by the Queen in Council in October, 1709,[40] but was not acted upon and became law through lapse of time.

It should be kept in mind, however, that neither the law of 1700 nor that of 1706, mentioned above, affected the subject with which this study deals and have only been mentioned because the former act was referred to as amplifying the terms of the constitution which itself contained the residential requirement.

As our study of Pennsylvania comes to a close, we are struck by the fact that it is the first province or colony thus far in this investigation in which non-residence representation was never practiced. It is difficult to find an explanation of

[36] Statutes of Pennsylvania (1682-1801), II, 24.

[37] Statutes of Pennsylvania, II, Appendix I, Section II.

[38] *Ibid.*, II, 213.

[39] Statutes of Pennsylvania, II, 213-214. In this connection it is interesting to note that the Pennsylvania constitution of 1790 forbade a resident of a town entitled to separate representation to be elected for the county containing the town and a resident of the county outside the town from representing the town. (Article I, Sec. 3.)

[40] Statutes of Pennsylvania (1682-1801), II, 221.

this which is not open to objection. The following is the most satisfactory to the writer. Penn was a democrat in every sense of the word. This was inevitably so when one of his station by birth became a Quaker through choice. He was at the same time a keen politician, using that word in its best sense. Being thoroughly familiar with English law and English practice regarding representation he or any other democrat could not fail to see that the practice, which was contrary to law, resulted in representation in parliament of property rather than of people. In Penn's dealings in America both in the Jerseys and in Pennsylvania there is abundant evidence that human rights took precedence in his mind over property rights. This was true even when it meant that he suffered financially because of his attitude on that matter, thus reaching a plane of practice which few people have reached even today.

In the light of the above, he evidently felt in drawing up his first Frame of Government that the representatives of the people should come from among those whom they represented. So a residential qualification was written into the first constitution of the province and was kept there throughout its provincial history, partly perhaps through the influence of the Quaker element in Pennsylvania politics, but also because of the fact that it is very doubtful if the people of any province once experiencing the privilege of this democratic innovation would have given it up, except under strong pressure from some powerful governmental influence.

DELAWARE

THE early legislative history of Delaware was so intimately connected with that of Pennsylvania that it is needless to repeat any portion of the previous chapter prior to the Charter of Privileges of 1701. That instrument provided that in case the representatives of the "Province and Territories" decided within three years not to meet together each might have a separate assembly. That of the Lower Counties[1] was to consist of as many members from each county as the people desired.[2] In inserting such a provision in the charter, Penn evidently foresaw trouble between the two sections of the province and took this means of easing what would have been, with him absent, an almost intolerable situation.

In fact, the friction almost resulted in a breaking of relations during the very assembly which adopted the Charter. The custom had been to hold some of the sessions of the assembly at Newcastle in the Lower Counties. The session of October, 1700, had been held there. For some reason when the assembly met the following October in Philadelphia, one of the first items of business was to confirm the laws passed at Newcastle the previous year. Upon this being proposed the representatives of the Lower Counties withdrew from the assembly.

They stated the reason for their withdrawal to be that if all laws enacted at Newcastle had to be re-enacted or confirmed at Philadelphia, then the two parts of the province were not equal as the act of union of 1682 had declared them. Penn replied that their action in withdrawing grieved him very much and that the confirmation of the laws previously passed was simply a matter of form to prevent any question concerning them arising during his absence.[3] The seceding

[1] This was the term generally used to designate the territory later called Delaware. It was also sometimes called the "Territories".

[2] Assembly Journal, Pennsylvania, Part II, p. III.

[3] This session was held before the regular time to enable Penn to sail for England to defend his title to the province. From his address to the assembly explaining this it is clear that he had hoped to spend the remainder of his days in the province.

members stated that their protest was not against him personally but that the union had been burdensome from the beginning. The situation thus revealed led Penn, as has been said above, to provide in the Charter of Privileges for separation, if it could not be avoided.

One clause of the Charter is supposed to have increased the discontent of the Lower Counties. That was the one granting the city of Philadelphia two representatives. Heretofore the parts of the province had been equal but in this the Lower Counties recognized the first step in the increase of the power of the province, while theirs from their very geographical location was bound to remain stationary.

When the assembly of 1702 met there were no representatives present from the Lower Counties. In fact, none had been chosen by them on the regular election day. The assembly adjourned and word was sent to the Lower Counties to send representatives. So an election was held there and the representatives chosen came to Philadelphia in November but refused to sit with the members from the province. The two groups finally met together on November seventeenth. On the nineteenth the Council sent a message to the assembly asking three questions:

(1) Are the representatives of the province willing to meet with the representatives of the territories to form an assembly?
(2) Are the representatives of the territories willing to meet with the representatives of the province to form an assembly?
(3) If either refuse what methods do they propose for the formation of an assembly?[4]

The members from the province answered "Yes" to the first question, but with conditions. The members from the Lower Counties answered as follows:

"The said members finding that they are called here on a different foot with those of the upper Counties cannot, if there was no other obstacle, join with them in Legislation, But are cheerful and willing when warrantably convened to proceed in Assembly to answer her majesty's Commands, and such other matters of importance as shall then be laid

[4] Pa. Col. Recs., II, 81.

before them, though they will not presume to direct the Government in what methods to convene them, they supposing it not their business, but that of those who rule over them." [5]

The governor was not satisfied with the answer of either party, and the next day dissolved the assembly after calling to their attention the fact that neither the importance of the matters before them nor the ill consequences of separation had moved them nearer a decision.

Up to this point it had been the representatives of the Lower Counties which wished to withdraw while those of the province had tried to retain them as an integral part of the provincial assembly. But now the positions were reversed. Just before the assembly was dissolved the members from the province presented an address to the governor calling his attention to the provisions in the Charter of 1701 for a separate assembly for each section in case of disagreement and prayed for an assembly for the province to be composed of eight members from each county.[6]

Governor Hamilton died soon afterward without taking any action on the matter and so when October, 1703, came eight members from each county of the province presented themselves as the assembly.[7] The council was at a loss what to do but finally recognized them as the assembly.

John Evans arrived as governor in early February, 1704. His commission appointed him the Proprietor's Lieutenant Governor for "Pennsylvania and Counties annexed".[8] On choosing new members for the council he selected three from the Lower Counties. This was part of Evans' deliberate program to reunite the province and territories. Soon thereafter the governor held a conference at Newcastle with some of the leading citizens of the Lower Counties and got them to agree to join with members from the province in an assembly. So, on his return, writs were prepared for an election in the Lower Counties in March, and setting the date of the assembly for April 10, 1704.

[5] Pa. Col. Recs., II, 82.
[6] *Ibid.*, II, 83-84.
[7] Assembly Journal, I; Part II, 1.
[8] Pa. Col. Recs., II, 116.

The members appearing on that date for the province were those chosen the previous October for the regular fall assembly. No members appeared for Sussex County, but the other two counties of the "territory" were represented. Upon assembling the members from the province said they desired to address the governor and council but not in the presence of "others", so the representatives from the two lower counties withdrew. The address called attention to the fact that they had been chosen under the proprietor's charter and therefore considered themselves "A House of themselves".[9] The next day all met the governor and council together. The governor addressed them on the advantages of unity and concord and urged a renewal of their joint association despite the steps toward separation already taken.[10]

After two days of conference between the two groups of representatives each presented a written address to the governor[11] and on the following day they appeared in joint session before the governor and council. All the documents relating to the matter at issue were read and each side stated its case. Briefly it was as follows:

Province:—That without violating their charter they could not recede from the position taken neither lessen nor reduce their number.

Territories:—That they would come into a joint assembly on the terms that each county in both sections should be represented by four members and no more.

At the conclusion both sides said:

"That as things now stand, it would be most suitable for each to act distinctly, to which they requested the Governor's Concurrence if he should think fitt." [12]

Seeing that his efforts to reunite the two parts of the province were useless, the governor met the Pennsylvania Assembly[13] on the seventeenth and recognized than as properly constituted to conduct provincial business. The Delaware

[9] Pa. Col. Recs., II, 126.
[10] *Ibid.*, II, 127-129.
[11] *Ibid.*, II, 130, 131.
[12] *Ibid.*, II, 132.
[13] Hereafter in referring to the "Territories" or Lower Counties the term Delaware will be used.

representatives were still in Philadelphia and the governor met them at the Bull's Head on the morning of the eighteenth. He told them that he would adjourn them to meet at Newcastle if in the opinion of Judge Monpesson he could legally do so. If not he would issue writs for an early election.

On April twentieth the matter was presented to the council and Judge Monpesson gave his opinion that writs for a new election had better be issued. This was done ordering the election of four representatives from each county to be elected on May twelfth and to meet the governor at Newcastle on the twenty-second. At the same meeting the council decreed that

"Ye Laws made and past by ye Province and annexed Counties, in conjunction, were still as much in force upon their separation, both in Province and Territories Separately as ever." [14]

The records do not state why the first Delaware Assembly did not meet at the time set in the election writs, namely, May 22, 1704, but Scharf states that the first assembly met in November. Most of the members who had been elected for the last joint assembly with Pennsylvania men were returned for this one. Scharf also states that a law was passed confirming all previous existing laws and one giving each county six members in the assembly.[15] No such law as the last one mentioned appears in a compilation of Delaware laws from 1700-1797, published at Newcastle in the latter year. Neither has any trace been found of it from any other source.

The first election act passed in Delaware, of which we have any record, was in 1734. This was entitled

. . . "An Act for regulating elections, and ascertaining the number of the Members of Assembly."

This law set the number of representatives at six from each county but provided that this number could be increased by the assembly at any time. Annual elections of representatives at the time and in the manner prescribed by the Charter of Privileges were to be held. Qualifications for voting and holding office were stated in the following portion of the act.

[14] Pa. Col. Recs., II, 138.

[15] Scharf, I, 129.

"Provided always, That no inhabitants of this government shall have right of electing or being elected as aforesaid, unless he or they be natural born subjects of Great Britain, or be naturalized in England, or in this government, or in the province of Pennsylvania, and unless such person or persons be of the age of twenty-one years or upwards, and be freeholder or freeholders in this government, and have fifty acres of land or more well settled, and twelve acres thereof cleared and improved, or be otherwise with Forty Pounds lawful money of this government clear estate, and have been resident therein for the space of two years before such election. . . ." [16]

As the above was the last legislative act by the Delaware Assembly on the general question of electoral qualifications prior to the adoption of its Revolutionary constitution this is a good place to inquire whether non-residence representation was permitted and practiced under the old constitution.

What was the Delaware constitution prior to the adoption of the one of 1776? Evidently the Charter of Privileges granted by Penn to the united province in 1701. Proof of this is seen in the fact that from the date of separation (1704) until 1776 Delaware recognized the authority of the provincial governor and council of Pennsylvania. Added proof is that the election act of 1734 brought the election practices of the province into harmony with the provisions of the Charter of Privileges.

The study of Pennsylvania has shown that the charter established a county residential qualification for representatives. While the act of 1734 quoted above seems only to establish a provincial residential qualification, the provisions of the charter would, of course, take precedence and govern the practice. So there is no doubt that in Delaware as in Pennsylvania non-residence representation of the counties in the assembly was prohibited and not practiced during the period of independent existence as it had been prohibited and not practiced during the period of union. In this connection it ought to be said, however, that in case of doubt in the matter there is no way of coming to an absolutely certain decision.

[16] Laws of Delaware (1776-1792), I, 148.

Under similar circumstances in other provinces recourse has been had to a checking of the lists of assembly members; but this is impossible in the case of Delaware as the Assembly Journal for the whole provincial period is missing.[17]

The qualifications for representatives in the assembly under the Constitution of 1776 are given in the following quotations:

1. "One of the branches of the Legislature shall be called, The House of Assembly, and shall consist of seven Representatives, to be chosen for each county annually of such persons as are freeholders of the same." [18]

"The other branch shall be called, The Council, and consist of Nine Members, three to be chosen for each county . . . who shall be freeholders of the county for which they are chosen. . . ." [19]

Here we have the apparent substitution of a freehold qualification for the freehold and residence qualification which had formerly prevailed. Yet it is hardly reasonable to suppose that Delaware at this late date in her provincial development changed a political practice of nearly a hundred years. It is more reasonable to assume that the established custom was taken for granted and specific reference to it omitted because this constitution, like all the Revolutionary constitutions, was hastily constructed and was never submitted to the people.

Again in case of doubt, however, we can have no proof one way or the other whether non-residence representation was practiced under the constitution of 1776, as there are no Assembly Records prior to 1791.[20] The first constitution of

[17] "There being no minutes of Legislative proceedings of such an early period existing in the state of Delaware, herein before stiled the territories. The traditional account is that all such minutes preceding the year One Thousand Seven Hundred and Twenty-two, were destroyed about that time by fire at the burning of Colonel John French's house in New Castle, in which it is said they were when that accident happened."

Note p. 49, Appendix Vol. I, Laws of Delaware, 1706–1797.

[18] Art. 2. Constitution of 1776.

[19] *Ibid.* Art. 3.

[20] "Sparks says: 'When the British were in Wilmington, a short time before the battle of Brandywine, and when they carried off Pres. McKinly, they also took away the public papers and journals belonging to the County of New Castle, pertaining to the old government. . . . The President was authorized to take measures to procure them. This seems never to have been done'."

Winsor, VIII, 452.

Delaware under her period of statehood was 1792. The clause of this which states the qualifications for members of the assembly reads:

"No person shall be a Representative who shall not have attained the age of twenty-four years, and have a freehold in the county in which he shall be chosen, and been a citizen and inhabitant of the state there years next preceding the first meeting of the Legislature after his election, and the last year of that term an inhabitant of the county in which he shall be chosen. . . ." [21]

So we find Delaware beginning her career as a state with a definite residential qualification for representatives written into her constitution. That this is simply the reflection of her practice for over a hundred years there can be little doubt.

[21] Laws of Delaware (1700-1797), I, XXXII.

MARYLAND

THE charter granting Maryland to Cecilius Calvert bore date of June 20, 1632. It made Calvert the absolute lord of his new possession with a single exception and in that exception we have the germ of the legislative system of the province. The part of the charter bearing on this point reads:

"We . . . do grant unto the said now baron . . . free, full and absolute power . . . to ordain, make, and enact laws of what kind soever, . . . of and with the advice, assent, and approbation of the free-men of the same province, or of the greater part of them, or of their delegates or deputies, whom we will shall be called together for the framing of laws, when, and as often as need shall require . . . and in the form which shall seem best to him or them. . . . ." [1]

While the above gave Lord Baltimore full authority over the assembly of freemen he had no option regarding whether or not he should have their coöperation in the government of the province. Under the authority granted him he could decide the form of the assembly; the unit of representation; the number of representatives; length of session; in fact, every phase of its organization and constitution was in his hands to decide as he wished; but call such an assembly of freemen he must, according to the wording of the charter. It has often been pointed out that under a proprietor of different type the government of Maryland would have been very oppressive, but as it was, after a few skirmishes with the proprietor in the early years of the province, the people through their representatives in the provincial assembly seem to have won as large a measure of self-government as obtained in any colony or province.

Government in Maryland can be said to have begun with the appointment of the governor and two

. . . "commissioners for the government of the province".

These officials were appointed by the proprietor in England

[1] Portion of section seven of Charter to Lord Baltimore, June 20, 1632. This can be found in Kilty's edition of the Laws of Maryland.

before they sailed for Maryland with about three hundred colonists in 1634.

Evidently no time was lost in calling an assembly, for we know such a body met in 1635, but there is no record of its proceedings. The early carrying out of the charter provision leads naturally to a consideration of Baltimore's policy on the question of assemblies. Putting it briefly it can be said that this policy was to call frequent assemblies, but to control their proceedings by retaining the right to initiate legislation himself and also the right of determining the number of members and how often they should meet. As we shall see later, from the first meeting of an assembly of which we have any record until the legislature had assumed its permanent form these rights of the proprietor were challenged and gradually taken from him or yeilded by him, whichever way one looks at it.

The unit of representation in the assembly was originally the hundred.[2] In the early days of the province there were but two counties, St. Marys, including all the western shore, and Kent, including Kent Island and the eastern shore. New counties and hundreds were created by act of the proprietor or by that of governor and council acting with his approval. As population increased the two original counties were inevitably sub-divided into several counties as fast as conditions demanded it. In 1654, under the Puritan Commissioners, the county was made the unit of representation in the assembly and this was retained after the restoration of the proprietor's authority in 1658.

The earliest assembly of which we have a record is one which met in January, 1638. In calling this both personal writs and writs of election were used. The former is something with which we have not met in any other colony or province so far in this study. By means of a personal writ the governor could summon whomsoever he pleased to be a member of the assembly without the one summoned having to trust his

[2] Archives, Council (1636-1667), 59, 70, 89, 91.
Archives, Assembly (1637–8—1664), 2, 87, *et. seq.*

chances at the election of delegates.[3] One of the election writs for this assembly has fortunately been preserved. It is the one to Captain Evelyn, commander of Kent County. He was directed to be present at a

. . . "g[ene]ral assembly of all the freemen of this Province to be held at his town of St. Maries on the five and twentieth day of January next." [4]

The writ stated that it was issued at the direction of the proprietor. Within six days Evelyn was to publish the proclamation to all the inhabitants of Kent Island and was to persuade them to come in person to the assembly. Those who could not come were to select

"such and so many persons as they or the maior part of them . . . shall agree upon to be the deputies or burgesses for the said freemen."

When this assembly met it was composed of officials (councilors and high constables) and twenty-one freemen. Of the latter twenty were registered as planters or gentlemen, and one as a carpenter. Not a single burgess or delegate appeared. Many freemen had given others their proxies, but these were practically all held by officials.[5] The roll of the assembly was never closed and practically every day witnessed the addition of new members.

This session considered some laws submitted by Lord Baltimore but rejected them.[6] On February 8, Lionel Calvert, governor of the province, or lieutenant-general as he was more frequently called, prorogued the assembly until February 26. The reason given was to enable a committee, which was drafting some laws to be submitted to Lord Baltimore, to have a chance to do its work. The meeting of the assembly was postponed until March fifth. On the sixteenth, after several days consideration, fourteen laws were passed.[7] The details of these we do not know, but one of them was "touching

[3] In the Maryland Records we find the words burgess, delegate, deputy, used interchangeably. The term delegate came to be the one most commonly used, however, although "burgess" was more commonly used in the early days of the province.

[4] Archives, Assembly (1637–8—1664), I.

[5] *Ibid.*, (1637–8—1664), 2-4.

[6] *Ibid.* (1637–8—1664), 9.

[7] *Ibid.* (1637–8—1664), 21.

g[ene]rall Assemblies".[8] The above acts were all rejected by the proprietor[9] probably because the passage of them infringed on his right to originate legislation.

The next assembly was held the following February, that is, 1639. This was largely a representative body rather than a primary one as the first[10] assembly had been. The reason for this was the form of an election writ. The one sent to the freemen of Mattapanient hundred read:

"Cæcilius Lord Proprietary to our trusty Richard Garnett Senior Richard Lusthead Anum Benum Henry Bishop Joseph Edlo Lewis Freeman and any other the Freemen inhabiting at Mattapanient Greeting whereas we have appointed to hold a General Assembly of the Freemen of our Province at our Fort of St. Marys On the five and twentieth day of this instant month of February these are therefore to will and require you that tomorrow or that on thursday next at the furthest . . . you and every one of you . . . make such nomination and Election of your Burgesses for that manor or division at Mattapanient for this next Assembly as you shall think fitt hereof fail not at your Perill." [11]

As has been said the assembly which met in response to the above form of writ was largely representative. Individual writs were issued to only three men in addition to the councilors. This assembly passed an act entitled:

"An Act for establishing the House of Assembly, and the Laws to be made therein. . . . The several Persons elected and returned (pursuant to the writs issued) shall be called Burgesses, and supply the Place of all the Freemen consenting to such Election . . . ; And that the Gentlemen summoned by his Lordship's special Writ, to each of them directed, the said Burgesses, and such other Freemen who have not consented to any of the Elections as aforesaid, as shall be at any Time assembled, or any Twelve or more of them (whereof the Lieut. General and Secretary to be always Two) shall be called the House of Assembly." [12]

Later in the same session on March 19,

[8] Archives, Assembly (1637–8—1664), 15.

[9] Bozman, II, 67.

[10] The word "first" is used to mean the first assembly of record.

[11] Archives, Assembly (1637–8—1664), 28.

[12] Laws of Maryland (1638 O. S.), Bacon Edition. This act reads a trifle differently in the Assembly Journal but the meaning is the same. Archives, Assembly (1637–8—1664), 82-83.

. . . "An Act ordaining certain Laws for the government of this Province"

was passed. Item fourteen of this reads:

"The Lieut. General and Secretary (or his Deputy) and Gentlemen summoned by special Writ, and one or two Burgesses out of every Hundred (at the choice of the Freemen) at any Time hereafter assembled, shall be judged a General Assembly." [13]

To find that both the first and second assemblies were so eager to give definite form to their constitution is evidence enough that the freemen of Maryland, like those in all the other colonies, felt that their rights as Englishmen could only be safeguarded by an independent legislative body of their own choosing. If this eagerness, on the part of the Maryland provincials, shown by the laws passed in 1638 and 1639, surprises us; we have a still greater surprise in store when we consider two laws proposed at this session which did not pass because of the governor's opposition. One of these, an act stating what persons should constitute the general assembly, seems clearly to have limited the privilege of voting to actual residents within each hundred. It stated that the assembly should consist of all council members; those summoned by the governor's special writ; the lord of each manor in the province and freemen representing each hundred. The latter were to be chosen as follows:

". . . the Sheriff of the County shall within every hundred summon all the Freemen Inhabiting within every hundred . . . to Assemble at a certain place and time to be by him appointed and prefixed which freemen so Assembled (or the major part of them) shall Elect and chuse some one, two or more able and Sufficient men for the hundred (as the said Freemen or the major part of them so assembled shall think good) to come to every such General Assembly." [14]

The other act was one providing for triennial assemblies,[15] with the provision that the freemen assembled therein were

[13] Laws of Maryland (1638 O. S.), Bacon Edition.

[14] Archives, Assembly (1637–8—1664), 74-75. This would also have made the assembly a representative rather than a primary legislative body.

[15] It should be noted that this was one year previous to the Parliamentary Triennial Election Act. The Maryland Assembly passed another Triennial Act in 1642 which was vetoed by the governor (Archives, Assembly, 1637–8—1664, 130), but triennal assemblies were finally obtained in October, 1654 (Archives, Assembly, 1637–8—1664, 341).

"to have the like Power, Privilege, Authority and Jurisdiction, in Causes and Matters arising in this Province, as the House of Commons in England have had, used or enjoyed." [16]

From 1639 to 1650 the assembly fluctuated between a primary and a representative body while a few members attended on personal writs. During this period it contained four classes of members: (1) Delegates; (2) Personally summoned; (3) Freemen; (4) Proxies. This variation can be best shown perhaps by giving the wording of the governor's election proclamations for the above-mentioned period:[17]

January, 1642.....'burgesses'
July, 1642.....'Burgesses'
August, 1642.....'freemen or Deputies'
December, 1642....'freemen or proxies'
March, 1643.....'freemen only'
November, 1644....'freemen, proxies or burgesses'
December, 1647....'freemen, proxies or burgesses' [18]

The year 1650 presents such a distinct step in the development of the legislature in Maryland that the assembly of that year should be noted at length. Governor Stone, the first Protestant governor of the province, issued an election proclamation in January. It read in part:

"Whereas the manner of summoning Assemblies within this province is wholly left to L[or]d Propr[ietor]s discretion, these are therefore in his L[ordshi]ps name and according to his direction to will and requyre you without delay to give Notice to all the ffreemen of St Maries County that they are to appear p[er]sonally att St. Maries the 2d day of Aprill next or ells by their proxies or Delegates, soe as noe one ffreeman soe appearing have above 2 proxies, besides his owne voyce, or that forthwith after such notice, the freemen of every hundred within the said County make choyce of Burgesses within every such hundred in manner following, Viz. That all the ffreemen of St. Clements hundred or the maior part of

[16] Archives, Assembly (1637–8—1664), 74-75.

[17] During this period Maryland came near having a woman in the assembly. In 1648 Mrs. Margaret Brent as administrator of the estate of the deceased governor, Lionel Calvert, claimed the right to cast two votes in the assembly. (Archives, Assembly, 1637–8—1664, 215.)

[18] Archives, Assembly (1637–8—1664), 114, 128, 167, 201, 213.

them, make choyce of one of the ffreemen of the said hundred for their Burgesse." [19]

(Then followed an enumeration of the hundreds of the county and the number of burgesses they might choose: namely, Newtowne—two or three; St. Georges—one or two; St. Maries—one; St. Inigoes—one or two; St. Michaells—one or two. In each case the specific provision was contained that the freeman or freemen chosen be "of that hundred". The proclamation closed with the paragraph:)

"Provided that the freemen of every of the said hundred or the maior part of them respectively doe agree together, in one of the two wayes of Assembling themselves last mentioned. Or otherwise they are all of them hereby requyred to appeare personally (and not by their Proxies, or Delegates or Burgesses) att the time and place, and for the purpose before expressed."

It will be noticed that the above gave the people of Maryland the choice between a primary and a representative assembly. All the hundreds showed their preference for the representative system by choosing delegates. After this date the assembly remained a representative body. When the assembly met it promptly organized itself into two houses and passed an act confirming that arrangement. So 1650 is not only the date of the permanent establishment of a representative assembly in Maryland but it is also the date of the beginning of a bicameral legislature.[20] Whether there is any connection between the above facts and the fact that 1650 marked the beginning of Protestant rule in the province is a question the answer to which would probably be determined by the political and religious background of the one answering it.[21]

After the establishment of a bicameral legislature the Upper House, as it was called, became the supporter of proprietary and royal interests while the Lower House stood firmly for the rights and privileges of the people. The history of future legislation in the province is largely a history of the contest between the two Houses.

[19] Archives, Assembly (1637–8—1664), 259.

[20] In Maryland, as in the other provinces, the councilors constituted the upper house.

[21] The assembly of 1650 was the first one in which the Puritan settlement of Providence (Annapolis) was represented. Some Catholic members refused to take the required oath because they interpreted it as forbidding them to tell even their confessor what transpired in the assembly.

About the only questions the constitution of the Lower House left unsettled at this date (1650) were the number of members to be chosen by or from each election unit and the required qualifications for ones so chosen. As both matters were always mentioned in the election writs or election proclamations, we will quote from these in chronological order until a definite and fully accepted policy was arrived at.

In February, 1661, a writ was issued to the sheriffs of each county requiring them to

. . . "cause to be elected such and soe many discreete men as you shall think fit to serve as Burgesses in the said Assembly."[22]

By this time there were six counties[23] in Maryland, and in response to the above writ, two, St. Marys and Calvert, sent four burgesses while the other counties sent two each. The next year the proclamation to the sheriffs calling an assembly contained these words:

". . . att the discretion of the Freemen of your County you cause one two three or foure discreete Burgesses to be elected to serve in the said Assembly. . . ."[24]

The change in the wording, in one particular, of these two documents, issued in consecutive years, summoning an assembly is due to the fact that when the assembly of 1661 met the lower house promptly sent a grievance committee to the governor and council asking for an interpretation of the writ summoning them. Their objection was that it seemed to leave the number of members to be chosen by each county to the discretion of the sheriff of the county. The governor and council replied that while the writ did seem to be open to that interpretation their thought was that the sheriff's power only extended to preventing the election of anyone disabled by law, while the "determinacon of the number and of the the persons to be Elected" was left to the freemen.[25]

[22] Archives, Assembly (1637–8—1664), 395.
[23] St. Marys, Charles, Calvert, Anne Arundel, Kent, Baltimore.
[24] Archives, Assembly (1637–8—1664), 425.
[25] *Ibid.* (1637–8—1664), 398.

Between the years 1666 and 1670 the feeling between the lower house on the one hand, and the governor and upper house on the other became very bitter. The governor was especially displeased with the attitude of the lower house in 1669. So when the election writs were issued in December, 1670, they differed materially from what had been customary. A new qualification both for electors and burgesses was laid down by the following words:

". . . thereby giving notice to all freemen of your said County who are within the said County Visible seated Plantations of fifty Acres of Land at the least or Visible personal Estates to the Value of fifty Pounds Sterling at the least requiring them to appear . . . and to elect and choose four several sufficient freemen of your said County. . . ." [26]

Then follows a statement of property qualifications similar to that for the electors. This was the first appearance of a property qualification for electors and burgesses.

The next law on the subject of representation came in the year 1678.[27] This was a comprehensive act. It stated the need of wholesome laws and that such laws could only be established by the

. . . "Consent of the freemen of this Province by their severall delegates and representatives by them freely nominated, chosen and Elected."

It further stated that the political practices of the assembly ought to follow as nearly as possible the proceedings of Parliament. It provided representation for cities and counties, still unformed, as soon as they should be created. Ordinary-keepers and sheriffs were disqualified from serving as delegates. The form of writ to be sent to each sheriff was given in the law. By it he was to call together at least four commissioners of the county and they with the clerk were to make proclamation thereby

. . . "giveing notice to all the freemen of your said County who have within your said County a freehold of fifty Acres

[26] Proceedings of the Council (1667—1687–88), 77-78.
[27] Archives, Assembly (1678-1683), 60-63.

of Land or a visible personall Estate of forty pounds starling att least Requiring them to appear att the next County Court . . . at which time . . . the said freemen . . . are hereby Authorized and Required to Elect and Chuse four severall and Sufficient freemen of your County each of them haveing a freehold of fifty Acres of land or a visible personall estate of fifty pounds starling att least within your County." [28]

The governor seems to have taken no action in regard to the law until 1681 when he vetoed it.[29] He gave as his reason that it was too great a burden on each county to send four delegates to the assembly. Evidently realizing that there was a demand in the province for a more definite understanding on the question as to the constitution of the assembly he issued a proclamation dated September 6, 1681, reminding all the freemen of Maryland that the charter to the proprietor empowered him to call assemblies in whatsoever form he wished. It continued that:

. . . "the forme of Assembling the said ffreemen their Delegates and Deputyes hath hitherto been altogether uncertain from the very beginning of the Seateing of this Province." [30]

So

. . . "ffor the setteling therefore of the mindes of the ffreemen and Establishing a certainty for the future"

definite rules were laid down. The form of writ contained in the proclamation does not differ a word from that contained in the law of 1678 except that only two deputies were to be chosen in each county.

The assembly elected under this writ met in October, 1682. On November second a lengthy address was sent to the governor by the Lower House calling his attention to the fact that his wishes regarding the number of delegates had been obeyed but that their constituents wished their former privilege of sending four delegates restored. They then presented a proposal which they hoped would

[28] Archives, Assembly (1678–1683), 61-62.
[29] Archives, Council (1671–1681), 378-379.
[30] *Ibid.* (1681—1685–6), 15.

. . . "fully comply with your Lordship's good intentions and Satisfie the Minds and Desire of the People." [31]

The proposal was that a law be passed that in the future all election writs

. . . "may go out for the Electing of Two three or four Delegates for each County at the Choice of the Freemen thereof."

A bill embodying these desires was sent to the Upper House. In recognizing its receipt this branch of the assembly upheld the governor's right to settle the matter in question, but went on to say that if it was done by legislative act it must be by action of both Houses

. . . "who legally Represent the Freemen of this Province."[32]

This was on November fourth, and it led to a resolution in the Lower House on the seventh which declared without a dissenting vote that

. . . "the Deputies and Delegates Chosen by the Freemen of this Province in a General Assembly are the only Representative Body of the Freemen of this Province." [33]

It also contained the declaration that the public ought not to be called upon to bear the expense of the Upper House.

In his reply the governor denied the request of the Lower House, stating that it would be as

. . . "inconvenient for the Freemen to accept as it may be dangerous for me to Grant."

He called their attention to the fact that he was only exercising powers granted him by the charter and probably got to the heart of the matter in this sentence:

". . . it would be as reasonable for me to give away my Power of Calling and Dissolving of Assemblies, as to give that of Choosing the Number of Delegates, and such Persons as think much I should hold my Power in the latter would not long be Satisfied afore they requested the power from me of the former." [34]

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[31] Archives, Assembly (1678–1683), 346.
[32] *Ibid.* (1678–1683), 354.
[33] *Ibid.* (1678–1683), 373.
[34] *Ibid.* (1678–1683), 355.

The next year the Lower House passed another act regarding "Electing and Summoning Burgesses", but we know nothing of its details as it was not accepted by the Upper House.[35] The latter body in turn prepared a bill which was just as unacceptable to the Lower House.[36]

Here the dispute between the two houses seems to have rested until 1692 when an election act was finally passed. As usual this act contained the form of writ to be issued to each sheriff. According to its terms the sheriff of each county was required at specified times to give

". . . notice to *all* the freemen of your said County who have within your said County a freehold of fifty Acres of Land or a Visible Estate of forty pounds Sterling at the least requiring them . . . to Elect and choose four severall and sufficient *freemen of your County*, each of them having a freehold of fifty Acres of Land or of Visible personall Estate of forty Pounds sterling at the least within your County. . ."[37]

Later in the act the right of St. Marys to be represented by "Two Cittizens"[38] was confirmed. Provision was also made for new counties and new cities. Upon the calling of the first assembly after the erection of any such county or city the sheriff of the county or the mayor recorder of the city was

. . . "to cause four freemen of the said county and two freemen of the said City and Borough, qualified as in the said Writ . . . ," [39]

to serve as delegates in the general assembly.

The next election act was passed in 1704.[40] It differs in no essential point from the one of 1692. This act was repealed by another one passed in December, 1708.[41] This differed little in essential details from the laws of 1698 to 1704. It did provide, however, that election writs should be issued forty days before the meeting of the assembly. Also in referring to the four freemen to be chosen this phrase occurs,

[35] Archives, Assembly (1678–1683), 535.
[36] *Ibid.* (1678–1683), 581.
[37] *Ibid.* (1684–1692), 542.
[38] *Ibid.* (1684–1692), 543.
[39] *Ibid.* (1684–1692), 544.
[40] *Ibid.* (1704–1706), 294-297. During this year a Residential Act affecting provincial officials was passed. It provided that no office of trust or profit should be open to anyone who had not resided in the province three years. (Archives, Assembly, 1700–1704, 429-430.)
[41] *Ibid.* (1707–1710), 352-353.

. . . "whether the parties so elected be present or absent."

The next legislative act bearing on this subject was in 1708, when Annapolis, which had now become the capital of the province, was granted representation. We have already seen that St. Marys was granted the privilege of sending "Two citizens" to the assembly in 1692. The removal of the capital to Annapolis had evidently resulted in the decay of St. Marys, for its privilege of being represented was now withdrawn and the privilege of representation in the assembly was extended to Annapolis in the following words:

"Then it was proposed whether It may not be proper to erect this Town and port of Annapolis into a City with the Privilege of sending two Citizens to the Genll Assembly." [42]

This was agreed to, Annapolis being

. . . "the Seate of Government and a growing place."

The last election act passed by the provincial assembly was in 1715. In general form it was similar to its predecessors but differed materially from them in containing the word "residents" and using it in such a manner as to leave doubt whether non-residence representation was permitted. As was customary the act contained the form of election writ to be used. The portion of the writ bearing on this study reads:

". . . thereby giving Notice to all the Freemen of your said County, who have within the said County a Free-hold of Fifty Acres of Land, or who shall be Residents, and have a visible Estate of Forty Pounds Sterling at the least thereby requiring them . . . to elect and choose Four several and sufficient Freemen of your County, each of them having a Freehold of Fifty Acres of Land, or who shall be a Resident, and have a visible Estate of Forty Pounds Sterling at the least, within your County, whether the Parties so elected be present or absent. . . . ." [43]

The wording of the above act as found in the Archives (Assembly) differs in an important particular, in respect to the subject of this study, from the law as it appears in Bacon's

[42] Archives, Council (1698–1731), 249.

[43] Laws of Maryland, Bacon Edition (1716), Chap. XI, Sec. III; Archives, Assembly (1715–1716), 270-274.

Edition of the Laws of Maryland. In the Archives the writ reads in part:

"Giving notice to all the freemen of your said County who have within the said County a ffreehold of ffifty Acres of Land who shall be residents or have a Visible Estate of forty pounds Sterling at the Least." [44]

If the latter wording is correct a residential qualification for delegates or representatives is plainly established, but if the wording in Bacon is correct there is a possibility that non-residence representation was permitted.

A rereading of the Act of 1715 as well as of those which preceded it will show that whether non-residence representation was permitted under Maryland law depends entirely upon the content and meaning of the word freemen. Prior to 1650, when the unit of representation was the hundred, there is no doubt that voting within each hundred was limited to actual residents and that one chosen to represent them must be a resident.[45]

Between 1650 and 1670 the wording of the writs is such that there is no clue as to the practice followed. But with the initiation of a property qualification for suffrage, in 1670, we at once meet the problem whether as in the case of most of the other colonies and provinces the ownership of land in a Maryland county made one a freeman of that county. Gambrall in his Early Maryland takes the position that in the early days of the province the word "freeman" meant every man not a servant or slave. Thus with manhood suffrage the man who was an indebted servant yesterday might be the legislator of to-morrow.[46] Bozman, on the other hand, assumes that the word "freemen" was synonymous with "freeholder".[47]

But on this point we have a very definite answer in a matter which arose in the assembly of 1642. The summons calling that assembly was directed to all . . .

. . . "freemen inhabiting within the Province to be at the said Assembly . . . either by themselves or their Deputies or Delegates." [48]

[44] Archives, Assembly (1715–1716), 271.
[45] Note the reading of the Election Act of 1639 and the Election Proclamation of 1650.
[46] Gambrall, 84. [47] Bozman, II, 47. [48] Archives, Assembly (1637–8—1664), 167.

When the assembly met the first item of business was this: "Mr. Thomas Weston being called pleaded he was no freeman because he had no land nor certain dwelling here, etc., but being put to the question it was voted that he was a Freeman and as such bound to his appearance by himself or proxie, whereupon he took place in the house." [49]

So it seems quite clear that according to Maryland usage freeman and inhabitant were synonymous terms. But after 1670 the privilege of holding office and of voting was restricted to freemen who were also freeholders. If the ownership of an estate in a county made the said owner a freeman of that county regardless of his place of residence, as it did for example in New York, then he could both vote in that county and be elected to represent it in the assembly.

Prior to 1715 it seems quite clear that the privilege of voting and being elected to office in the county was restricted to residents; in other words that ownership of land in a county carried with it no political privileges unless one resided there. But the very wording of the law of 1715, "having a freehold *or* a resident", raises a doubt in regard to the matter which in the absence of any authoritative statement regarding it can only be settled by finding out whether any Maryland county was ever represented by a non-resident.

The lists of assembly members from 1650 to 1732 (which is as late as the assembly records have them published) have been carefully examined and checked. Not a single case of non-residence representation appears. There are a few instances in the records which at first consideration might look like non-residence representation but every one can be satisfactorily explained. For example, John Salter appears as a delegate for Kent County in 1701 and 1704; for Prince George in September, 1708; and for Queen Anne's in December, 1708 and 1709.[50] Salter was a resident of both Kent and Queen Anne's counties at the time he represented each.[51] In all probability he lived in that part of Kent which went into the new county of Queen Anne's when it was formed in

[49] Archives, Assembly (1637–8—1664), 170.
[50] *Ibid.* (1700–1704), 128, 356; *Ibid.* (1707–1710), 202, 267, 410.
[51] Hanson, 348; Baldwin, IV, 36.

1706. Listing Salter as a delegate for Prince George in September, 1708, is a clerical error. At this same session Major James Smallwood, who represented Charles County continuously from 1693 to 1713, appears for Cecil County.[52] The error regarding both Smallwood and Salter is clearly shown by a report[53] of the Committee of Elections which was presented a few days after the opening of the session.

Some other instances where we find the same man appearing at different times for different counties can all be accounted for by the division of the old counties to form new ones, a process which automatically changed the legal residence of many people.

The only form of non-residence representation ever practiced in Maryland was during the period in which freemen were allowed to choose proxies to represent them in the assembly which at the time was a primary body. Speaking of the first assembly, Steiner says,

"Proxies, however, paid no regard to hundred lines; but one man might hold proxies from all three hundreds." [54]

At the end of the provincial period we find Maryland writing her political practice regarding representation into her first constitution, that of 1776:

"That the legislature consist of two distinct branches, a senate, and a house of delegates, which shall be styled The General Assembly of Maryland.

"That the house of delegates shall be chosen in the following manner: All free men, above twenty-one years of age, having a freehold of fifty acres of land in the county in which they offer to vote, and residing therein, and all free men, having property in this state above the value of thirty pounds current money, and having resided in the county in which they offer to vote one whole year next preceding the election, shall have a right of suffrage in the election of delegates for such county." [55]

Electors so qualified were to elect annually by *viva voce* vote

[52] Archives, Assembly (1707–1710), 202.

[53] *Ibid.* (1707–1710), 208-209.

[54] Steiner, 76.

[55] Section II, Constitution of 1776. Section 14 also provided a residential qualification for senators.

"four delegates for their respective counties, of the most wise, sensible and discreet of the people, residents in the county where they are to be chosen one whole year next preceding the election, above twenty-one years of age, and having in the state real or personal property above the value of five hundred pounds current money."

Strange as it may seem the only instance in Maryland history where ownership of land carried with it the privilege of voting was provided for in this constitution. Referring to Annapolis, it declared

. . . "but the inhabitants of the said city shall not be entitled to vote for delegates for Anne-Arundel county, unless they have a freehold of fifty acres of land in the county, distinct from the city." [56]

This, of course, was no violation of the county residential clause in the same instrument.

Why one rule should have been applied to Annapolis and a different one to Baltimore is hard to understand. Section six of the constitution of 1776 specifically confined representation of that city to residents and further provided that they could not vote in nor represent the county.

In Maryland as in Pennsylvania, where the people were allowed to determine the qualifications of their representatives without pressure from either proprietor or crown, we find that they did the logical and natural thing, that is, chose men as their representatives whose chief interest, through residence, lay within their election unit.

[56] Section IV, Constitution of 1776. Even this form of non-residence voting came to an end in 1799.

VIRGINIA

One approaches a study of Virginia with an attitude instinctively different from that in the case of any other colony. A certain distinction characterizes the legislative beginnings of this colony. "The first representative body in America" is a phrase which to all minds calls up at once the House of Burgesses of 1619.

In no other colony is there found such a diversity of forms of representation as was the case in Virginia in the successive periods of its history. Chandler calls attention to this[1] and part of the list as he gives it follows:

(1) Representation by settlements or plantations with no definite number of representatives from each settlement.
(2) Parish and county representation without a fixed number of delegates from either the parishes or counties.
(3) Representation by counties only, two representatives from each county, neither more nor less, whether the counties were large or small.
(4) Representation to the College of William and Mary in accordance with the English custom of allowing representation to the universities.
(5) Borough representation, granted by the town charters, or by an act of the general assembly.

While representative government developed early in Virginia there was no hint of it in any of the first three charters. The charter of 1606 did not grant powers of government to the London Company. The settlement at Jamestown was simply a plantation owned by the company. The colonists were servants of the company.[2] There was no private property and little liberty. The immediate source of authority in the province was a council of residents appointed by the Council of Virginia, in England, which in turn was appointed by the crown.

The charter of 1609 made the London Company a joint stock company and gave it governmental powers. It brought

[1] Representation in Virginia, 5.
[2] Osgood, I, 34.

no liberties to the planters but the corporation gained many.[3] Under this charter the colonists were ruled by a strict code of laws drawn up in England.

About the only change made by the charter of 1612 was that by this instrument the company gained the right to elect the council, a function formerly exercised by the king. So by this time the company had full authority in the province.[4]

The next date of importance in Virginia history is 1618 at which time the affairs of the London Company passed into the control of the Sandys-Southampton party. This group was interested in increasing the number of inhabitants of the colony and in bringing about private ownership of the land, in contrast to the common ownership of the earliest days and to the system of manors or "associations of planters" which was the form private ownership first took when permitted at all.

Evidently the controlling faction of the London Company felt that one of the best ways to accomplish its purpose was to let the colonists share the responsibility of the government. So when Sir George Yeardley was appointed governor in 1618 his commission is supposed to have authorized him to call an assembly. As the commission has never been found, the only contemporary account we have is in a "Declaration by the Ancient Planters". This reads in part:

". . . that they might have a hand in the governinge of themselves, it was granted that a general assemblie should be helde yearly once, whereat were to be present the Gov'r and Counsell, with two Burgesses from each plantation freely to be elected by the inhabitants thereof; this Assembly to have power to make and ordaine whatsoever laws and orders should by them be thought good and proffittable per our subsistance." [5]

Governor Yeardley arrived in the province in April, 1619, bringing with him what Brown calls "our Magna Charta".[6]

[3] Osgood, I, 59.
[4] The term province is used here as the company was really a proprietor.
[5] Journal of the House of Burgesses, 1619-1658-9, 36.
[6] The First Republic in America, 308.

He sent out his summons commanding the councilors and two burgesses[7] from each plantation to meet at Jamestown on July 30, 1619 (O. S.). In order to have a proper setting for our study of Virginia a little space ought to be given to the geographical units represented in this assembly and the details of the first sessions so far as we know them.

The settlements by this time extended from the mouth of the James River to a little above what is now Richmond. The four main divisions of the province were the City of Henrico, Charles City, James City, and the Borough of Kiccowtan. These correspond approximately with the present counties of Henrico, Charles City, James City, and Warwick, with the addition of a strip of territory opposite each one on the right hand bank of the James.

In the first assembly the following units were represented:

1. City of Henrico.
2. Charles City:
   - (a) Martin's Brandon,[8]
   - (b) Bermuda Hundred, Charles City,
   - (c) Smythe's Hundred,
   - (d) Flowerdieu Hundred,
   - (e) Ward's Plantation.
3. James City:
   - (a) James City,
   - (b) Argall's Gift,
   - (c) Martin's Hundred,
   - (d) Lawne's Plantation,
4. Borough of Kiccowtan.

In all there were eleven units or divisions of the colony represented when the roll of the first assembly was called. The dismissal of the two members noted above reduced this

[7] The term "borough" was applied by the company to every division whether a hundred, plantation or town and the term "Burgess" originally to every voter within them. The representatives in assembly were called Burgesses "at the start, not because they were representatives, but because they were citizens and voters in these boroughs." Soon, however, the idea of representation became attached to the word and it continued after the boroughs disappeared; in fact, down to the Revolution (Journals of the House of Burgesses, 1619—1658–9, XXVII).

[8] The representatives from this division were not allowed to be seated.

number to ten. The assembly of 1619 therefore consisted of the governor, council, and twenty burgesses. It met in the church, the council and governor sitting in the choir and the burgesses in the body of the church.[9] The speaker, John Pory, was not a burgess but a councilor. He was a Cambridge graduate and had been a member of Parliament for six years.[10]

None of the acts of this first assembly bear on this study, but it is significant to note the early assertion of two privileges or rights which every assembly seemed to feel were fundamental. For example, the session was scarcely begun when the right to pass on the qualifications of members was asserted and the two burgesses from Martin's Hundred were dismissed. The other matter referred to concerned the disallowance of acts passed by the assembly. While it recognized the right of the company to disallow acts of the assembly it requested that all acts passed might be considered in force until notice of their disallowance reached the province. Then the assembly went one step further, and a bold step it was, in requesting that it might have the reciprocal privilege of disallowing any acts of the company's court which it deemed inapplicable under conditions in the province. The response of the company to the above requests will appear later.

The earliest official act, establishing an assembly in Virginia, which has come down to us, bears date of 1621. On July 24 of that year year an Ordinance and Constitution of the Treasurer, Council, and Company in England, for a Council of State and General Assembly was adopted by the company. The Council of State was to consist, for the time being, of the governor and his councilors, all of which were named in the instrument.

"The other council, more generally to be called by the governor once yearly, and no oftener, but for very extraordinary and important occasions, shall consist for the present, of the said council of state, and *of two burgesses out of every town, hundred, or other particular plantation, to be respectively*

[9] The assembly did not become bicameral until about 1680.

[10] Brown, 317.

chosen by the inhabitants: which council shall be called The General Assembly, wherein (as also in the said council of state) all matters shall be decided, determined and ordered by the greater part of the voices then present; reserving to the governor always a negative voice." [11]

This section also gave the assembly the power to enact such laws as the "publick weal" demanded and as seemed necessary. No law was to be in force until ratified by a general quarter court of the company in England. A reciprocal arrangement was to become effective regarding quarter court orders in the province

. . . "after the government of the said colony shall once have been well framed, and settled accordingly."

On the same day the Ordinance was passed Sir Francis Wyatt's commission as governor was issued. It contained a summary[12] of the Ordinance and was the governor's authority for putting the provisions of that instrument into operation.

When the London company lost its charter in 1624 Virginia became perforce a royal province. No provision was made for an assembly but Wyatt, who continued in office, and his Council, were willing to share their power with the people. Having no authority to summon an assembly he summoned a representative body in 1625 to which was applied the name convention. A portion of the writ summoning this body reads:

"Whereas there are divers important occasions wch hereby concerne the generall Estate of Ye Colony, These are yt you cale together all the fremen of ye plantac' under you Comand And by the maior p'tie of ye voyt (voice) to elect two of ye most sufficient uppon whose judgements the rest wilbe Contented to rely ye they Appere at James Cyttie of the 10th of Maye next ensuinge, where we hope the business will not detain them above three or fower dyes.[13]

The convention drew up a petition to the king and entrusted it to former Governor Yeardley, who was elected provincial agent and instructed to proceed at once to England. Immediately upon his arrival in October, 1625, Yeardley

[11] Hening, I, 112.
[12] Ibid., I, 113. [13] Journal of the House of Burgesses, 1619–1658–9, XXX.

petitioned Charles to permit him to appear before the Privy Council and present the claims of Virginia. In his petition to the king he outlined what he wished to present. One of the things was:

"To avoid the oppression of Governors there; that their liberty of Generall Assemblyes may be continued and confirmed, and that they may have a voice in election of officers as in other corporations." [14]

Whether Yeardley ever appeared before the Privy Council does not appear but at any rate he was appointed governor in March, 1626,[15] and sailed for the province soon thereafter. He bore no reply to the convention's petition but continued his predecessor's use of conventions. He died in November, 1627, and was succeeded by Francis West. By this date Charles had decided to grant the colony the privilege of an assembly and had sent word to that effect by William Capps, who arrived in the province in March, 1628. West at once ordered an assembly for March 20th.[16]

As this marks the beginning of an unbroken line of assemblies this phase of the subject can be left with the statement that an assembly was not summoned yearly as proposed in the Ordinance of 1621, but met at the pleasure of the governor, which was quite frequently, however,[17] there being one hundred and twenty-one sessions between 1619 and 1776.[18]

Virginia shows the greatest variation of any province regarding the number of burgesses representing each unit of representation. Two, however, was the usual number allowed each unit. County representation was established coincident with the creation of eight counties in 1634.[19] After this date, though, parishes were allowed representation but this caused much trouble due to the question arising whether the salaries of parish burgesses were to be paid by the parish or by the county containing the parish.[20] After 1669 each county was represented regularly by two burgesses.

[14] Brown, 643. [15] Hazard, 230. [16] Brown, 648.

[17] An exception to this, of course, was during the fourteen years preceding Bacon's Rebellion. One assembly only was elected during that period.

[18] Chandler, 15. [19] Hening, I, 224.

[20] For a complete statement regarding the varying number of burgesses, see Chandler, 15-17, and Miller, Chap. II.

This now brings us to the particular problem of Virginia's rule and practice regarding a residence qualification for burgesses. As we might expect, we find this bound up closely with the question of qualification for electors and this in turn intimately connected with the question of the ownership of property. For a complete statement of all the matters mentioned above except residence the reader is referred to Chapters II and III of Miller.

Many laws appear among the statutes of Virginia, during the provincial period, dealing with the general subject of elections. No better method of treatment suggests itself than to take these up chronologically.

It has already been pointed out that during the proprietary period and also during the interval between that and the establishment of a royal government only residents were chosen to represent each unit in the House of Burgesses or in the provincial conventions.

The first election act, bearing on this subject, passed after Virginia became a royal province was in 1640.[21] This provided that no sheriff was

". . . to compel any man to go off the plantation where he lives to choose burgesses."

This plainly provided for residential voting only and residential voting always carried with it residential representation.

The next act bears date of 1655. It read in part:

"That all persons who shall be elected to serve in Assembly shall be such and no other than such as are persons of knowne integrity and of good conversation and of the age of one and twenty years—That all house keepers, whether freeholders, leaseholders or otherwise tenants, shall only be capeable to elect Burgesses,— Provided that this word house keepers repeated in this act extend no further than to one person in a ffamily." [22]

A portion of the above act was repealed by the next assembly in March, 1656, and the right of suffrage was extended to all freemen by the following provision:

[21] Hening, I, 227.

[22] Hening, I, 412.

"Whereas we conceive it something hard and unagreeable to reason that any person shall pay equall taxes and yet have no votes in elections, therefore it is enacted by the present General Assembly, that soe much of the act for chooseing Burgesses be repealed as excluded freemen from votes. . . ." [23]

The only exclusion of freemen from the privilege of suffrage under act of 1655 had lain in the phrase "one person in a family."

This whole matter was cleared up, however, in a very complete election act in 1658. This was really a restatement of the acts of 1656 and 1657. The only important change was that all reference to "householders" and others was omitted and this clause substituted:

"And all persons inhabitting in this collonie that are freemen to have their votes in the election of Burgesses. . . ." [24]

In 1670 a freehold qualification for voting first appears in Virginia. Prior to this date all freemen[25] had exercised the privilege of suffrage. There had, of course, been no non-residence representation. But by a freehold qualification for voting there is recognized the right of property to be represented and this we have found always brings with it non-residence voting and usually non-residence representation.

The reason for this change in suffrage qualification is evident when one remembers that the period from 1660 to 1675 was one of reaction under Governor Berkeley. During the protectorate Virginia had been practically a free democracy. But with the reinstatement of a royal governor in 1660 there began a gradual infringement on the rights and privileges formerly enjoyed by the people, which finally culminated in Bacon's Rebellion. The royal tone and English influence in the act of 1670 is very noticeable.

"Whereas the usuall way of chuseing burgesses by the votes of all persons who haveing served their tyme are ffremen of this country doe oftener make tumults at the election to the disturbance of his majesties peace, then by their votes

[23] Hening, I, 403. [24] *Ibid.*, I, 475.

[25] No act defining the term "freeman" appears in the colonial laws of Virginia. That the term was synonymous with "free man" seems evident from the opening sentence of the election act of 1670.

provide for the conservation thereof, by makeing choyce of persons fitly qualified for the discharge of soe greate a trust, and whereas the lawes of England grant a voyce in such elections only to such as by their estates real or personall have interest enough to tye them to the endeavor of the publique good; It is hereby enacted, that none but ffreeholders and housekeepers who are answerable to the publique for the levies shall hereinafter have a voice in the election of any burgesses in this country. . . . ." [26]

The assembly which met under the influence of Bacon in 1676 passed several measures all tending to relieve the discontent of the colonists. One of these acts[27] was the repeal of the Election Act of 1670 and the extension of the suffrage once again to all freemen. Another act of this same year which affects this study was one providing that the burgesses for Jamestown should be chosen by the

. . . "housekeepers, freeholders and freemen, as are at the time of such election listed within the bounds aforesaid, and soe liable to pay levies there, and by none other, any custome or usage to the contrary notwithstanding." [28]

This plainly established residence representation for Jamestown as, of course, only those voting there would be eligible for election.

But Virginia's relief from what many considered an unjust curtailment of the privilege of suffrage was short lived. With the reinstatement of Berkeley in 1677, additional Instructions were sent him from England. The part affecting this study read:

"You shalbe noe more obliged to call an assembly once every yeare, but only once in two yeares, unlesse some emergent occasion shall make it necessary, the judging whereof wee leave to your discretion. Alsoe whensoever the assembly is called ffourteene dayes shall be the time prefixed for their sitting and noe longer, unlesse you finde goode cause to continue it beyond that tyme.

You shall take care that the members of the assembly be elected only by ffreeholders, as being more agreeable to the custome of England, to which you are as nigh as conveniently you can to conforme yourselfe." [29]

[26] Hening, II, 280.
[27] *Ibid.*, II, 356.
[28] *Ibid.*, II, 362.
[29] *Ibid.*, II, 425.

By the above a freehold qualification for voting and holding office was established by royal command, and this remained the practice of the province throughout the remainder of its colonial existence.

In 1692 an act was passed which contained the form of return to be used by the sheriffs in reporting the election of burgesses. As I believe this form shows that only residents could be returned under it it is given in full:

"By vertue of this writt I have caused to be Summoned the Freeholders of my county to meet this day being the day of Anno. At the Courte house of ye saide Countie being the usuall place for Election of Burgesses and given them in charge to make Election *of two of the most able and discreet Persons of the said County* who accordingly have elected A. B. & C. D. who have full power and authority for the said County aforesaid to act and consent to such things which shall be Ordered and appointed by ye Governor, Councill & Burgesses at the next meeting and Session of Assembly." [30]

From this date to the adoption of the constitution of 1776 only residents could have been legally elected burgesses by the various counties. Reasons for this statement will be given in full later. But at this point, the period from 1670, which date marks the adoption of a freehold qualification for suffrage, to 1692 should be examined to see whether it shows that non-residence representation was practiced even when there was no law preventing it.

But four instances of non-residence representation appear during this period. Miles Carey, of Warwick County,[31] represented his own county from 1684 to 1692,[32] but represented James City in 1693.[33] Since these two were adjoining counties it might be thought probable that the above was a result of removal from one to the other or of a shift in boundary lines between them. But neither seems to have been the case and so we have a clear instance of non-residence representation.

The above suggests that there are several instances in the House Journals where the same man represented different

[30] Journal of the House of Burgesses, 1659–60—1693, 388-389.
[31] Colonial Virginia Register, 39; Bruce, II, 577.
[32] Journals of the House of Burgesses (1659–60—1693), XI, XIII, XIV.
[33] *Ibid.*, XV.

counties but merely as the result of the formation of new counties out of old ones. For example, William Leigh represented New Kent in the first session of 1692, but Kings and Queens in the second session of that year and in 1693.[34] Lemuel Moses represented Lower Norfolk almost continuously from 1661 to 1690, but in 1693 he appears as a burgess from Norfolk County.[35] William Robinson also represented Lower Norfolk from 1684 to 1686, but Norfolk in 1691. Arthur Spicer represented Rappahannock County from 1685 to 1688, but appears for Richmond in 1693.[36] Likewise William Colston represented Rappahannock at one time and later appears for Richmond.

But to return to instances of non-residence representation. St. Leger Codd, a resident of Northumberland County,[37] represented his own county in 1680-1682,[38] but was also chosen as the representative of Lancaster County at the same session.[39] According to the Journal record he was evidently given his choice as to which county he would represent.[40] He chose to serve for his home county, but in 1684 he was again elected to represent Lancaster County and did so in the assembly of that year.[41] Edward Hill, a member of a prominent family of Charles City County,[42] represented that county for several years previous to 1679, but in that year he was a burgess from James City County.[43] He later, 1684, again represented his home county.[44] The fourth and last instance is that of Thomas Matthew, of Northumberland County, who was a burgess for Stafford in the Bacon Assembly of 1676.[45]

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[34] Kings and Queens first represented in second session of 1692.

[35] Norfolk formed in 1691 from Lower Norfolk (Howes Outline of History of Virginia, 392).

[36] Richmond County created in 1692 when Rappahannock was extinguished, forming Essex and Richmond (Howes, 463).

[37] Bruce, Social Life of Virginia, 63.

[38] Journals of the House of Burgesses, 1659–60—1693), X.

[39] Bruce, Institutional History of Virginia, II, 421-422.

[40] Journals of the House of Burgesses (1659–60—1693), 122.

[41] *Ibid.* (1659–60—1693), XI.

[42] Colonial Virginia Register, 36, 42; Bruce, Institutional History, II, 24.

[43] Journals of the House of Burgesses (1659–60—1693), 126.

[44] *Ibid.* (1659–60—1693), XI.

[45] Bruce, Institutional History, II, 421; House Journal (1659–60—1693), IX.

From this point to the constitution of 1776 there are six acts bearing on the general subject of elections. An alaborate act was passed in 1699.[46] This covered practically every phase of the subject. Voting was confined strictly to the freeholder of county or town. Nothing was said about the qualifications for burgesses but the act itself contained the very form of return writ provided by the law of 1692.

Of the many election acts passed by the Virginia provincial assembly the only one containing a plain statement regarding a residential qualification was in 1705. This provided:

"That the Freeholders of every county that now is or hereafter shall be in this dominion, now have, and hereafter shall have the privilege and liberty of electing and choosing two of the most fit and able men of such respectively, to be present, and to act and vote in all General Assemblies. . . ." [47]

A later clause of the same act provided that

". . . every freeholder, actually resident within the county where the election is to be made, . . . shall appear accordingly, and give his vote. . . . ." [48]

The next law[49] on this subject was in 1736 and it is remarkable in one particular. While providing for property representation it limited this in a way that no other colony did. The preamble stated that the act was called into being by the fact that much fraud had been practiced by leases and sales of land upon feigned considerations

. . . "to create and multiply votes".[50]

So the freehold necessary to carry with it the privilege of suffrage was definitely stated. One must have one hundred acres of unimproved land or twenty-five acres of land with a house upon it. He must have had title to it for at least one year if it had been purchased.[51] Had it been inherited this provision was waived. But here is the point of departure from similar laws in other colonies. If the one hundred acres lay in two different counties the owner could vote only in the county containing the larger part.

[46] Hening, III, 172-174. [47] *Ibid.*, III, 236. [48] *Ibid.*, III, 238.

[49] Williamsburg was given representation in 1735. Voting was confined to residents and only citizens could be chosen burgesses. Hening, V, 205.

[50] Hening V, 475-476.

[51] In the margin of the statute it says, "Residence of one year required".

While such a provision does not absolutely make impossible non-residence voting and non-residence representation yet the chance of either is negligible. It is hardly probable that, when a man had but one vote, he would cast that in a county where he did not live. It seems that one would only do this when it chanced, as would sometimes, but seldom, be the case, that he lived nearer the county seat of a county where he owned property than he did to the county seat of the county in which he resided.

The Election Act of 1762 would seem, on the face of it, to give the voters of each county the privilege of electing their burgesses wherever they chose.[52] But it contained the provision of the law of 1736 that the freeholder could vote in but one county, and it also contained the form of election return adopted in 1692. In 1769 a long act differing in no essential detail from the above act was passed.

Without a checking of the lists of assembly members from 1692 to 1776 the position has been taken that there was no non-resident representation during this period. The reason for such is that such representation would have been plainly illegal as has been shown. Yet in Miller's thoroughgoing study of the legislature of Virginia this statement is found:

. . . "Residence in the county from which elected was probably not compulsory, for Patrick Henry was chosen from Louisa County in 1765, though he was not then a resident of that county." [53]

W. W. Henry[54] makes the same statement and says that a former burgess from Louisa County stepped aside so that the province might have the services of Patrick Henry, who was a resident of Hanover County. The same author says later that Patrick Henry moved to "his place" in Louisa County in 1765 and remained there until 1768. William Wirt, however, in his life of Patrick Henry, which was written after consultation with many men who knew him well, says:

[52] The freeholders were to have the privilege of electing "two of the most able and fit men, being freeholders, qualified to vote in such county respectively." (Hening, VII, 517-530.)

[53] p. 51. [54] Patrick Henry, Life, Correspondence and Speeches, 61, 70, 123.

". . . he removed in the year 1764 to the County of Louisa and resided at a place called the Roundabout." [55]

The Assembly of 1765 met on May first and the vacancy in the representation of Louisa County was not officially acted upon until that date. The former burgess had been chosen coroner, which incapacitated him from serving any longer. An election was ordered to fill the vacancy and on May 20th Patrick Henry took his seat in the Assembly as a representative from Louisa County.[56] Even if W. W. Henry rather than Wirt is correct about the date of Patrick Henry's removal to Louisa County, it is evident from the above that there were five months in 1765 in which he might have made the change of location prior to his election. Taking into consideration the law in the matter, it is altogether probable that he was a resident of Louisa County when chosen a burgess for that county.

Virginia's provincial history covered a period of one hundred and fifty-seven years. During one hundred and thirty-five of those years she had a residential qualification for burgesses. Her Revolutionary constitution of 1776 confirmed this practice and carried it over into the new state government. Defining the various powers of the new government that document declared:

Sec. IV. "The Legislative shall be formed of two distinct branches, who, together, shall be a complete Legislature. They shall meet once or oftener, every year, and shall be called the General Assembly of Virginia.

Sec. V. One of these shall be called the House of Delegates, and consist of two Representatives to be chosen for each county . . . annually, of such men as actually reside in and are freeholders of the same. . . ." [57]

As our study of Virginia ends at this point it only remains for brief comment to be made on the preceding pages. As in other colonies a freehold qualification for suffrage was adopted

[55] p. 55.

[56] Journal of the House of Burgesses (1761-1765), 345, 374. Events must have moved rapidly, for only nine days later he introduced his famous resolutions against the stamp tax.

[57] Hening, I, 51.

in Virginia only when the forces of the royal government were in the ascendency and those of the assembly on the decline. Where Virginia differs from other colonies is that in them a freehold qualification for suffrage brought with it non-residence voting and non-residence representation. So did it in Virginia, but for a space of twenty-two years only when the assembly found a way, evidently intentionally, to restrict voting to residents without at the same time running afoul the royal requirement that suffrage must be based on ownership.

During the twenty-two years when non-residence representation was allowed we have found only four cases where the right of choosing a non-resident was exercised by a Virginia county. Curiously enough in two of these cases it was James City County, within whose bounds the assembly met that chose a non-resident. The very fewness of the cases of non-residence representation is added proof of the fact mentioned in connection with other provinces that, in the absence of continual pressure from crown or proprietor and where there was no city in the province of sufficient size and importance to dominate the life of the province, the inhabitants followed the logical and natural course of action in choosing their representatives in the provincial legislature.

NORTH CAROLINA

THE settlements which afterward became the nucleus around which a new government was formed south of Virginia were an overflow from the southern counties of that province. When they were later included in the territory granted to the Earl of Clarendon and his associates the transfer of authority over them was marked by even less governmental oversight and direction than they had previously had. It is not too much to say that the Albemarle settlements developed throughout the proprietary period with practically no help from the proprietors. On the other hand, they felt the repressive hand of the proprietors just as little. The explanation of such a situation is that the Carolina territory was granted to a group of proprietors instead of to a single one. So it inevitably followed that no uniform purpose and plan could obtain in its development.

Colonization began in earnest after Carolina had been granted to the proprietors in 1663. The charter of that year contained the usual grant of legislative power to the proprietors. In that portion of the charter directing that the power of legislation should be shared with the freemen lies the germ of the North Carolina Assembly. Legislation was to be by the proprietors.

". . . with the advice, assent and approbation of the freemen of the said province, or of the greater part of them, or of their delegates or deputies, whom for enacting of the said laws, when and as often as need shall require, we will that the said (here follow the names of all the proprietors) and their heirs, shall from time to time assemble in such manner and form as to them shall seem best." [1]

A later clause gave the proprietors or their magistrates alone the right to make laws temporarily,

. . . "because such assemblies of freeholders cannot be so conveniently called, as there may be occasion to require the same." [2]

[1] N. C. Col. Recs., I, 23. [2] *Ibid.*, I, 24.

In an attempt to attract settlers to the new province the proprietors issued in 1663 a "Declarations and Proposals to all that will Plant in Carolina". One of the promises contained therein was that there would be an assembly composed of

. . . "Two out of every tribe, division or parish." [3]

Governor William Berkeley, of Virginia, was one of the proprietors. Being near the new province a commission[4] was issued him in 1663 authorizing him to commission a governor for Albemarle River. He could appoint two governors if he wished—one for the north side of the river and one for the south, along with six councilors. The governor and councilors so appointed were to have the power to make necessary laws,

. . . "by and with the advice and consent of the freeholders or freemen or the Major part of them, their deputyes or deligates."

Berkeley appointed William Drummond governor. It should be kept in mind that the only people in the province at this time were those already on the ground when the charter of 1663 was issued.

The Charter of 1665 differed little from the one of 1663. Under its provisions the assembly in addition to governor and council was to consist of the

. . . "freemen of the said province or territory, or of the freemen of the county, barony, or colony, for which such law or constitution shall be made." [5]

The provision enabling the governor and council to legislate for the time being was worded as in the former charter with the single change of the word "conveniently" to "suddenly".[6]

The liberal terms of the Concessions and Agreements issued the same year as the second charter have often been commented upon. By some they have been thought to reflect the liberal political views of the proprietors. They seem, however, to have been issued in response to the demands of

[3] N. C. Col. Recs., I, 45.
[4] *Ibid.*, I, 48-50.
[5] *Ibid.*, I, 105.
[6] *Ibid.*, I, 106.

the party of Barbadians who were going to make a settlement near Cape Fear.[7] Eleven sections of the Concessions[8] were given to an enumeration of the powers of the assembly. Had they all been put into operation the assembly in Carolina, as Osgood points out,

. . . "would have occupied a position where elsewhere it won only as a result of prolonged effort and the accumulation of many precedents." [9]

The portion of the Concessions bearing on this study read:

"That the inhabitants being freemen or chiefe agents to others of ye Countyes aforesd doe as soone as this our Commission shall arrive by virtue of a writt in our names by the Governor . . . make choice of twelve Deputyes or representatives from among themselves whoe being chosen are to joyne with him the s[ai]d Governor and Councill for the makeing of such Lawes Ordinances and Constitutions as shalbe necessary for the present good and welfare of the severall Countyes aforesd but as soone as Parishes Divisions tribes or districcons of ye said Countyes are made that then ye Inhabitants or Freeholders of the sevll and respective Parishes Tribes Divisions of Districcons of the Countyes aforesd doe . . . annually meete on ye first day of January and chuse freeholders for each respective denizen Tribe or parish to be ye Deputyes or representatives of ye same, which body of Representatives or ye Majr parte of them shall wth the Governor and Council aforesd be ye Genll Assembly of the County for which they shall be chosen. . . ."[10]

In examining the constitutional background of the North Carolina Assembly we now come in point of time to the Fundamental Constitutions, a document inseparably associated with the name of John Locke. In one way a consideration of this would fit more appropriately into the chapter of South Carolina, for it was in that province that the proprietors made their most earnest endeavor to enfocre its provisions. But since it was meant to apply to the Carolina territory as a whole, notice must be taken of it here.

This document[11] was feudal and monarchial in character

[7] N. C. Col. Recs., I, 39-42.
[8] *Ibid.*, I, 81-84.
[9] Osgood, II, 205.
[10] N. C. Col. Recs., I, 81.
[11] *Ibid.*, I, 187-205.

and showed a distinct reaction against the liberal spirit which had characterized the "Concessions". In fact, the avowed purpose was to make the government of the province

. . . "most agreeable to the Monarchy . . . and that we may avoid erecting a numerous democracy." [12]

The law-making body was to be called Parliament and it was to be composed of four groups sitting together but voting by groups. A majority vote in any one group was sufficient to defeat a measure. These groups were:

(a) Proprietor's Deputies,
(b) Landgraves,
(c) Caciques,
(d) Representatives.

The qualifications for electors and for representatives appear in the following:

"There shall be a Parliament consisting of the Proprietors, or their deputies, the Landgraves and Caciques, and one freeholder out of every precinct, to be chosen by the freeholders of the said precinct respectively. They shall sit all together in one room, and have, every member, one vote.

"No man shall be chosen a member of Parliament, who has less than five hundred acres of freehold within the precinct for which he is chosen, nor shall any have a vote in chooseing the said member, that hath less than fifty acres of freehold within the said precinct.

"A new Parliament shall be assembled the first Monday of the month of November, every second year." [13]

A copy of the Fundamental Constitutions was sent to Governor Peter Carteret of "Albemarle" and his Council in 1670, together with Instructions.[14] The latter states that the proprietors realize the impossibility of putting the "model government" into effect at once, so for the present the governor was to,

". . . Issue out writts to the Fower Precints of the County of Albemarle requiring each of them to elect five freeholders to be their representatives to whom the five

[12] N. C. Col. Recs, I, 188.
[13] *Ibid.*, I, 199.
[14] *Ibid.*, I, 181-183.

persons chosen by us being added and who for the present represent the Nobility are to be your Assembly. . . ." [15]

The assembly which met as a result of this order was not the first one for this territory however. Not much is known of the ones which had preceded it but it is quite certain that there were sessions in 1665, 1667, and 1669.[16] After 1670 the sessions were quite regular. This date does mark, however, the first definite authority for the choice of any particular number of representatives by each election unit.

Prior to 1691 the Albemarle settlements had had a separate executive from those settlements which had been made near Cape Fear and farther south. But in this year the proprietors decided to unite the whole colony under one executive and one assembly. The instructions to Governore Philip Ludwell are given in the chapter on South Carolina. They contain a plan for the assembly in which Albermarle County was to have five representatives, while the same number was given to each of the three counties which lay in the territory that later became South Carolina. The proprietors must have had some doubt regarding the feasibility of this plan, for on the same date Private Instructions were issued to Ludwell regarding the constitution of the assembly in case he found it "Impracticable for to have the Inhabitants of Albermarle County to send Delegates to the General Assembly. . . . ." [17]

The governor must have found it "impracticable," for no attempt seems to have been made to interfere with the Albemarle Assembly. From this date, however, to 1712 there was one executive. The actual working out of this plan resulted in the northern part of the colony having as an executive a deputy governor appointed by the governor at Charleston. When no deputy governor was appointed, as at times was the case, executive power was exercised by the president of the council. Attention has often been called to this period of neglect on the part of the proprietors, but this neglect had, without doubt, its compensating features. Thrust

[15] N. C. Col. Recs., I, 181.
[16] Osgood, II, 235; N. C. Col. Recs., I, 183-187.
[17] N. C. Col. Recs., I, 380.

thus practically upon its own resources, the assembly became accustomed to assuming certain responsibilities which it would not later surrender.

It was during this period that the first extension of settlement as reflected in the membership of the assembly occurred. At a Palatine's Court held by Governor Archdale in December, 1696, the county of Bath was created and was granted the privilege of sending two burgesses to the assembly which was to meet the following month.

In 1712 Edward Hyde was commissioned by the proprietors as governor of North Carolina. This date, therefore, marks the complete separation of the two parts of the province.[18] Neither Governor Hyde's commission nor that of his successor two years later contained anything regarding assemblies which means, without doubt, that the assembly continued to be elected on the same basis as had obtained since 1670.

Three years after the separation from South Carolina the assembly passed a comprehensive election law which is often referred to in the records of the time as the Biennial Act. The reason for its enactment was that

". . . frequent sitting of Assemblies is a principal safeguard of their peoples Priviledges." [19]

The freemen of the eight precincts mentioned by name, of Albemarle County[20] were to choose each two years,

"five Freeholders out of every precinct." [21]

Provision was made that the new precincts should have the privilege of sending two representatives each.

Qualifications for voting were: twenty-one years of age; one full year residence in the province and to have paid one year's levy. No statement appears as to the amount of freehold required to make a freeman eligible for election as a

[18] N. C. Col. Recs., I, 731, 775-779, 841. [19] *Ibid.*, II, 213.

[20] The term Albemarle County up to this date was practically the colony name; in other words, it was synonymous with North Carolina. The precincts were really counties. Of the eight precincts mentioned in this act seven of them appear as counties on a present-day map of North Carolina.

[21] N. C. Col. Recs., II, 214.

representative. This act continued to govern elections in the province until after the transfer of authority from proprietors to the crown in 1729.

The first town to be granted representation in the assembly was Bath in 1715. The act permitting it to send one representative to the assembly extended the same privilege to all other towns of the province as soon as

. . . "such Town shall have at least Sixty Families".[22]

The first royal governor, George Burrington, was appointed in 1730. His commission[23] authorized him to call General Assemblies of "Freeholders and Planters", as need might require. He was cautioned in his Instructions to see that the assembly was elected "only by freeholders".[24] But to obey his Instructions on this point would bring him into conflict with the law of the province for by act of 1715 election of members of the assembly was by "freemen". The governor soon found this law in his way, for in 1732 he wrote the home government

. . . "The Biennial Act must be reprealed to bring the people into good Disposition." [25]

The contest over this matter evidently raised the question as to what was the constitution of the province, the charters of 1663 and 1665 or the governor's Commission and Instructions.[26] The governor's suggestion brought action for the law of 1715 was

. . . "Repealed by his Majesty's order",[27]

but we do not learn just when.

It must have been, however, about at the end of Burrington's adminstration. His successor, Gabriel Johnston, was commissioned in 1733, but did not assume office until the following year. His Instructions do not appear in the records but the Lords of Trade in a letter to the King, July 18, 1733,

[22] Acts of Assembly of N. C. (Davis Edition), 19.
[23] N. C. Col. Recs., III, 66-73.
[24] *Ibid.*, III, 93.
[25] *Ibid.*, III, 343.
[26] Raper, 45.
[27] Laws of N. C. (Iredell-Martin Edition), 9.

say that they contained no "material alteration"[28] from those issued his predecessor. Without having that document to examine we know that if the subject of suffrage qualification was mentioned a freehold requirement was insisted upon. During the first year of Johnston's administration an act setting the qualification of electors and representatives was passed and received the governor's approval.[29] No details about it appear in the records neither is the law given in any of the editions of colonial laws. This makes it seem probable that it was disallowed by the king.

This leaves us face to face with the puzzling question as what rule governed elections, and designated the number to be chosen from each county, between the repeal of the law of 1715 and the enactment of the one of 1743.

The election act[30] of the latter year begins

. . . "Whereas there is no law now in force . . ."

This act covered the whole question of elections. All elections were to be by ballot. Voting was confined to freeholders who were compelled to take an oath they had owned fifty acres of land for at least three months in the county in which they appeared to vote and that they had been inhabitants of the province six months. To be chosen a member of the assembly one must be twenty-one years of age; an inhabitant of the province one year; and most possess a freehold

. . . "in the county where he shall be elected or chosen"

of at least one hundred acres of land.

So far as we have any record the above act while changing the whole basis of suffrage in the province did not arouse serious opposition. The colonists probably bowed before the constant and irresistible royal pressure which demanded a property qualification for suffrage. But an election act of three years later raised a storm which was not quieted for years.

Governor Johnston summoned the assembly to meet that

[28] N. C. Col. Recs., III, 497.
[29] *Ibid.*, IV, 97, 108.
[30] Laws of N. C. (Swann's Edition), 177-180.

year, 1746, at Wilmington. This was not the usual place of meeting and the northern counties, those of the old Albemarle settlements, refused to send representatives because of the distance. As a result there was not a legal quorum but that did not deter the governor nor those members which did appear. At the time the act was passed there were only fourteen members present[31] although more appeared later. The preamble[32] of the act stated that the northern counties were accustomed to sending five persons to represent them, while the southern and western counties, which were more numerous and contributed more "to the General Tax" of the province, only sent two each. To remedy this situation the representation of all counties was limited to two. The effect of this in the northern counties can be imagined. Petitions and depositions[33] galore were sent to England in protest. From one of the former we have a partial answer to the query raised above regarding the representatives from each county when there was no law governing the subject. It is said that the counties of the Albemarle territory had each elected

. . . "five burgesses without intermission continued so ever since the Establishment of this Government not only under the late Lords Proprietors but also under your Majesty's Governors until Nov. 1746." [34]

The act of 1746 was repealed by the crown in 1754 but during those years the northeastern counties were not represented in the lower house of the assembly, as they would not elect fewer than five representatives.[35] Between 1754 and 1775 the former unequal representation was continued.

By 1760 the election act of 1743, which governed elections after the repeal of the election act of 1746, had become inoperative, but how or why are questions the records do not answer. With no law on the subject Governor Dobbs was at a loss where to turn for authority regarding elections. He made the very unusual decision, for a royal governor,

[31] N. C. Col. Recs., IV, 1159.
[32] N. C. Col. Laws (Swann), 223-224.
[33] N. C. Col. Recs., IV, 1169-1179; For the governor's point of view see *Ibid.*, IV 1163-1166.
[34] *Ibid.*, IV, 1158.
[35] Raper, 91.

that the charters granted the proprietors were in force in the absence of law on the subject.

His point of view is shown by his answers to a set of resolutions passed by the lower house of the assembly which he sent to the Board of Trade:

"14th Resolution That the diversity of the Forms in writs of election issued to different Counties, some of which direct the Freeholders and others the Inhabitants in General to choose, by which last form servants and even Convicts, may elect. . . . ."

"Answer: In answer to this I must observe that upon the repeal of these and several other Laws which depended upon them, I was at a great loss how to issue the writs as the Law for Freeholders to elect was then repealed, and therefore I thought myself obliged to follow the first and second Charters of the Colony, which power was loged in the Freemen of the Colony or their delegates, and as I did not advert to the distinction made between Freemen and Inhabitants as my intention was that all free inhabitants should be Electors, until a proper law should again fix it to Freeholders. . . ." [36]

This situation was remedied by the Election Act of 1760, the last one during the provincial period.[37] The election machinery provided for by this act differed from that of 1743 but the qualification for voters and for representatives were exactly the same as in the latter. This act also provided for non-residence voting in towns in a manner different from anything noted so far in this study. By the last section of the act Brunswick was granted representation. To be a representative from there one must have owned, for three months at least, . . .

". . . a Brick, Stone or framed House, in the said town, of the Dimensions of Twenty Feet by Sixteen, with one or more Brick or Stone Chimney or Chimnies. . . ." [38]

Every tenant of such a house for three months prior to election could vote. In case such a house was unoccupied the owner of the house could vote in the town election.

[36] N. C. Col. Recs., VI, 303. [37] N. C. Col. Laws (Davis Edition), 247-250.
[38] *Ibid.* (Davis Edition), 250.

Nothing further appears among the laws of North Carolina regarding qualifications for representatives until the Constitution of 1776. But before noting that document we will see what had been the practice of the colony regarding the use of non-residents as representatives.

The law of 1715 governed elections until 1735 and to a certain extent until 1743. Under that law voting was by the freemen while their choice of representatives was plainly limited to resident freeholders. But the law of 1743 imposed the English system of representation upon the colony. Under this a specific freehold qualification was provided for both electors and representatives. The working out of such a law in every colony was that one could vote in whatsoever county he held a sufficient freehold and was likewise eligible for election from that county. So the only period which needs to be examined for non-residence representation is that between 1743 and 1776. A careful examination of the records shows twelve clear cases of non-residence representation.[39]

John Ash, a resident[40] of New Hanover County, represented that county practically continuously from 1752 to 1775, but at a May session of the Assembly in 1759 he represented Craven County.[41]

Tom Barker, a resident[42] of Chowan County, began his career as a representative by serving for the neighboring county of Bertie for the years of 1744 and 1747. Later he served for Edenton, the principal town of his county, from 1754 to 1757, and for the county of Chowan for 1760 and 1761.[43] Another Chowan resident who represented a neighing county was James Blount (Blunt). He represented Chowan in 1764 and from 1766 to 1773, but in 1765 he was one of the representatives of Perquimans County.[44]

[39] On their face the records seem to show many instances. Some of these are due to identity of names; removal; change in boundary lines, etc. A few instances which may have been cases of non-residence representation but which could not be satisfactorily verified have been omitted.

[40] Waddell, History of New Hanover County, I, 166.

[41] N. C. Col. Recs., VI, 97.

[42] Grimes, Abstract of N. C. Wills, 8, 123, 281, 349.

[43] N. C. Col. Recs., IV, 733, 1181; V, 232, 521, 850; VI, 362, 661.

[44] *Ibid.*, VII, 63; XVI, 979; XXIII, 993.

Richard Caswell was one of the most prominent and most active public men during the fifteen years prior to the Revolution. He was also the first governor of North Carolina during its existence as an independent commonwealth. He was a resident[45] of Dobbs County in the western part of the state and represented his county practically continuously from 1760 to the Revolution. But in October, 1769, he represented the town of New Berne, where the assembly met that year, and in December of the following year he was the representative of Bath.[46]

John Dunn, an official of Rowan County, represented Anson County in 1762. Later he served for Salisbury, the principal town of Rowan County.[47]

William Hooper, a resident of New Hanover,[48] represented the town of Campbelton (now Fayetteville) in January, 1773, and his own county in December of the same year.[49]

In 1773 Memucan Hunt appears as representative for both Bute and Granville Counties.[50] These were adjoining counties on the northern border of the state. There is no record in the House Journal that Hunt had to decide as to which county he would represent although in two similar cases, which will be noted later, that was demanded of representatives which appeared for two counties.

William Maccay's (Mackay) period of service as a representative for the county of Tyrrel extended from 1746 to November, 1762.[51] The only break during this period was in April, 1762, when he represented Perquimans County.[52]

Thomas Macknight, of Currituck County, represented that county from 1762 to 1775. But in 1773 he was also chosen as a representative of Pasquotank County. He was asked to make his choice as to which county he wished to represent, and, as might be expected, he chose the one in which he resided.[53]

[45] N. C. Col. Recs., VIII, p. IV.
[46] *Ibid.*, VIII, 105, 303.
[47] *Ibid.*, V, 320, 828; VI, 801; VIII, 107.
[48] Waddell, I, 197, 208.
[49] N. C. Col. Recs., IX, 448, 734.
[50] *Ibid.*, IX, 733, 734.
[51] *Ibid.*, IV, 815, 856; V, 232, 521, 893; VI, 390, 662, 893.
[52] *Ibid.*, VI, 800.
[53] *Ibid.*, IX, 452, 635-636.

A case similar to the above had occurred in 1746. In that year Samuel Swann, one of the most prominent men of the province, was elected representative by the county of Onslow, where he lived and also by New Hanover County.[54] After being elected speaker he was asked for which county he would serve and he replied, Onslow; whereupon the clerk was instructed to issue writs for a new election in New Hanover.

Edmund Smithwick (Southwick), of Tyrrel County, is another example of a representative of experience being chosen by a county in which he did not reside. He was a representative of his county[55] in nearly every assembly from 1744 to 1771, but in 1766 he represented Northampton County.[56]

An exactly similar instance to the above is that of Edward Vail, who represented the county of Chowan continuously from 1754 to 1769 except in November, 1766, when he served as one of the representatives for Onslow County.[57]

Non-residence representation in North Carolina has some aspects strikingly similar to New England. Men do not seem to have been chosen as representatives simply because they were large landowners in the county electing them. When a county did go outside its bounds for a representative, a prominent man and one of legislative experience was chosen. In fact, there must have been some pride, as in New England, in being represented by a well-known public man. Otherwise, it is hard to account for Chowan County choosing John Ash as one of its representatives in 1759, when the assembly met within its borders, or New Berne's choice of a non-resident (Caswell) as its single representative in 1769, or Bath's choice of Caswell the following year as its representative.

Election of non-residents also seems to have been as a result of merit rather than as a result of campaigning. This fact is shown by the three double elections given above. A candidate would probably not offer himself in more than one

[54] N. C. Col. Recs., IV, 815.
[55] *Ibid.*, IV, VI, VII, VIII.
[56] *Ibid.*, VII, 342.
[57] *Ibid.*, VII, 343.

county knowing that he would be allowed to serve for but one. There is a possibility, of course, that this might be done if the candidate felt he faced possible defeat in his home county, but there is reason to believe that the three cases given represent the spontaneous choice by two counties of the same capable and experienced public official.

In North Carolina, the adoption of its first constitution brought only a qualified residential qualification for representatives. Each county was to have two representatives and their qualifications were stated in Section Six.

"That each Member of the House of Commons shall have usually resided in the County in which he is chosen, for one year immediately preceding his Election, and for six Months shall have possessed and continue to possess, in the county which he represents, not less than one hundred acres of Land in Fee, or for the Term of his own Life."

This constitution retained a slight freehold qualification for voting for senators. In order to vote for representatives the qualifications were: 21 years of age; one year resident in any county; and to "have paid Public Taxes". One meeting these requirements could vote in the county where he resided.

Non-resident voting was not entirely abolished, however, for Section Nine specifically provided that every person paying public taxes in any town entitled to representation could vote in that town.

How the statement of residential qualification affected the practice of non-residence representation in North Carolina is beyond the province of this study, which is supposed to extend only over the provincial period. The next constitution of the state, that of 1868, brought North Carolina into harmony with most of her sister states in requiring a representative to be a resident of the county from which he was chosen.[58]

[58] This Constitution retained among other qualifications for senators, however, that the one elected "shall usually have resided in the district from which he is chosen one year immediately preceding his election". The wording of this requirement was not changed in the last Constitution, that of 1875.

SOUTH CAROLINA

In the chapter on North Carolina several documents were mentioned and quoted which bear as closely on the legislative history of South Carolina as they do on that of its northern neighbor. These were:

1. Charter of 1663.
2. Declarations and Proposals of 1663.
3. Charter of 1665.
4. Concessions and Agreements of 1665.
5. Fundamental Constitutions of 1669 and 1670

All that has been said in the preceding chapter on the above instruments applies here. We only need to note in passing that the first charter contained the germ of the South Carolina legislature as truly as it did that of North Carolina and that the proprietors made a much more determined effort to put the Fundamental Constitutions into effect in South Carolina than in her sister colony.

Sir John Yeamans was appointed governor of

. . . "the County of Clarendon, near Cape Faire. . . ." [1]

in 1665. This was the settlement of Barbadians which the proprietors had in mind in issuing the Concessions and Agreements. Yeamans had jurisdiction over all the southern part of the province of Carolina. In an attempt to attract colonists from England, the proprietors published a description of the colony in 1666. One of the advantages pictured was that the colonists chose

. . . "annually from among themselves a certain number of men according to their divisions"

as an assembly.[2] This attempt at settlement was abandoned in 1667.

About this very time the Earl of Shaftsbury became the most active proprietor. He was especially interested in the southern part of the province. So the proprietors began

[1] N. C. Col. Recs., I, 97. [2] *Ibid.*, I, 157.

laying plans for a settlement at Port Royal. It was in this connection that Shaftsbury had Locke prepare a form of government for the whole province but with the new settlement especially in mind. The preparation of such an instrument shows that the proprietors, like those of Pennsylvania and the Jerseys, thought they could anticipate the course of natural political development and could mould the political forms and practices of the colony in advance.[3] This attempt on the part of the proprietors was doomed to failure but they did not desist for many years. At every attempt to put any of the provisions of the Fundamental Constitutions into effect the colonists fell back upon that provision of the charter of 1663 which promised that legislation was to be by the proprietors

". . . with the advice, assent and approbation of the freemen of the said province." [4]

Sir John Yeamans, although living in Barbadoes, was still nominally the governor of Carolina. So when the settlers constituting the new attempt at colonization left England, in July, 1669, he was sent a governor's commission in blank with authority to insert the name of one who he thought would satisfactorily administer the affairs of the province.

Yeamans named William Sayle. The commission then read:

"To our trusty and Welbeloved Will. Sayle, Esq. Governor of all that Territory or parte of our Province of Carolina that lyes to ye Southward & Westward of Cape Carteret. . . ." [5]

Accompanying this commission were instructions which took cognizance of the fact that the Fundamental Constitutions could not be put into operation immediately. So for the time being Sayle was instructed:

. . . "to summon ye freehoulders of ye Collony & require you in our names to elect twenty persons, wch together wth our Deputys for ye present are to be yr Parliament. . . . ." [6]

Sayle did not carry out the above instructions for the reason, as he later stated, that the population of the province was

[3] Osgood, II, 211.
[4] N. C. Col. Recs., I, 23.
[5] Shaftsbury Papers: Coll. Hist. Soc. of S. C., V, 117.
[6] *Ibid.*, V, 120.

. . . "nott heere sufficient to elect a Parliement."

Dissatisfaction with the governor's failure to act resulted in election writs being issued by two individuals who had no authority to do so. The parliament which was elected at this election was the first one in South Carolina. It met in July, 1670. Since the election was not legally called the governor did not recognize it. This body is often referred to as "Mr. Owens' Parliament".[7] The first legal Parliament met in August, 1671, after the arrival of Governor Joseph West.

In 1682 instructions were received from the proprietors ordering the creation of three counties: Berkeley, consisting of the territory around Charleston; Craven in the northern part of the province; and Colleton in the southern part. Prior to this all elections had been held in Charleston, but now Berkeley and Colleton each were to elect ten deputies and elections in the latter county were to be held at London (Wilton). To make it impossible for one to vote in both counties, elections were to be held in each on the same day. This order aroused a storm of protest, especially in Berkeley County, and the governor disregarded it and held the next election as usual.

Attention has been called in the chapter on North Carolina to the fact that the appointment of Philip Ludwell, as governor in 1691, marked an attempt on the part of the proprietors to unite both parts of the province under one executive and one assembly. His instructions after reciting that the patent from the crown gave the proprietors the right to legislate with the approbation and consent of the freemen instructed him whenever he thought there was need of laws—

". . . to Issue writs to the Sheriffs of the respective Countyes to choose twenty Delegates for the freemen of Carolina, viz. five for Albemarle County five for Colleton County and five for Berkeley County and five for Craven County to meet and in such place and in such time as you . . . shall think fit. . . ." [8]

Sections Twenty-one and Twenty-two set the bounds of the counties mentioned above, while Sections Twenty-four and

[7] Shaftsbury Papers: Coll. Hist. Soc. of S. C., V, 176. [8] N. C. Col. Recs., I, 377.

Twenty-five provided representation for new counties as fast as they were formed.

"And as other Countys come to be planted and make it appear there is forty free holders in the County you are to issue Writs in such Countys for the choice of four Delegates also to represent them in the generall Assembly of the freemen of the Province and before any County have forty free holders so as to have Writs directed to it for the choice of Representatives for the county they *reside* in they are to give their votes for the choice of delegates in the county next to them that is qualified to choose Delegates." [9]

As soon as some new county availed itself of this privilege of representation the representation of the four counties specified by name was to be reduced to four each.

Additional instructions issued the same day to Ludwell ordered that if it proved to be impracticable for Albemarle County to send delegates to the assembly, Berkeley and Colleton should choose seven each and Craven six for the general assembly

. . . "of that part of our province that lyes south and west of Cape Fear."

This arrangement was to continue until new counties were formed and the instructions could be put into effect.[10] The issuance of such instructions practically amounted to an abandonment of the effort to put the Fundamental Constitutions into effect. A contest soon developed between the governor and the assembly and the latter drew up a set of grievances. Number six of these was:

"That the Representatives or delegates of the People are too few in the Assembly and that the People doe not appoint the number of their delegates according to the King's most gracious Charter." [11]

Some time in 1692, whether before or after the adoption of the set of grievances we do not know, an act was passed regarding elections.[12] As we do not have a copy of this its

[9] N. C. Col. Recs., I, 378.
[10] *Ibid.*, I, 380-381.
[11] Rivers, 434.
[12] Statutes at Large (Cooper Ed.), II, 73.

provisions must be surmised from the reasons given by the proprietors for vetoing it. Referring to this particular law, in a communication dated April 10, 1693, they said:

". . . which act enabling all persons that take oath that they are worth tenn pounds, to give their vote for members of General Assembly, and all the members of the Assembly for the present being chosen for the Counties, we are of opinion they ought all to be freeholders that elect, and those act, not mentioning how long any person worth tenn pounds must have been an Inhabitant of the County before he be admitted to vote for members of the Assembly, it is so loose that by this Act all the Pyrates that were in the Shipp that had been plundering in the Red Sea had been qualified to vote for Representatives in Carolina. . . ." [13]

It is clear from the above that the act of 1692 had bestowed the privilege of suffrage and in all probability the right to be elected to the assembly upon every freeman who was worth ten pounds.[14]

The veto of the act of 1692 evidently made the people of the province all the more determined to decide the qualifications of electors and members of the general assembly themselves. In November, 1695, Governor Archdale in an election writ to the High Sheriff of Berkeley County says that despite all his endeavors to settle

. . . "This Province in Peace and tranquility"

he had been frustrated

. . . "by the obstinate majority of the House of Commons."

The writ then continues

"We, therefore, hereby, dispensing with our Power to us Granted by our Charter, and former Precedents, Command you to Summon all . . . the freemen Inhabitants of Berkly County to . . . appear at Charleston, on 19th day of December next, then and there by a majority of their voices to agree to and ascertain the number of their Representatives for this part of the Province, to consult and advise

[13] Rivers, 437.

[14] This same year the assembly gained the right of sharing the initiation of legislation with the governor and council.

with us about making such laws as shall be necessary for the safety and defence of this Province. . . . ." [15]

It should be noted that this summoned all the freemen to the election of 1695. The assembly which was chosen at that election passed an election act.[16] The qualifications for electors were: twenty-one years of age; ownership of fifty acres of land or personal property to the value of £10; three months residence in district where vote was offered. No alien born out of allegiance to the queen was eligible to a seat in the house. Evidently other qualifications of members were the same as for electors.

The next election act was in 1704. The qualifications for electors were the same as in the act of 1696. This act, like its predecessors, did not prescribe the voting districts nor state the number of representatives allotted to each county.[17]

By the act of 1716 the parish was made the election unit of South Carolina.[18] McCrady says this act

. . . "established the peculiar parish system of South Carolina which was to last for a century and a half."

Elections were to be held in each parish by the church wardens. The number of members of the Commons House of Assembly[19] was placed at thirty and apportioned among the parishes. The qualifications prescribed by the act of 1704 were modified. An elector must be a white man, twenty-one years of age, professing the Christian religion, and must have resided in the province six months. The freehold qualification was removed but the money qualification raised to £30. In order to be qualified to sit as a member of the house one must be possessed of £500 current money in goods or chattels or owner of 500 acres of land. The voter could only vote for members from the parish wherein he actually resided and the one elected must have the required financial holdings or freehold in the parish choosing him.

[15] Rivers, 439.

[16] Statutes at Large (Cooper Edition), II, 130; McCrady, South Carolina under the Proprietary Government, 424.

[17] Statutes at Large, II, 249.

[18] *Ibid.*, II, 563.

[19] This body had different names at different periods. Lower House and Commons House of Assembly were the ones most commonly used.

Under date of July, 1718, the proprietors ordered the governor among other things to

"Annul also, the two following acts: the one entitled an act to keep inviolate and preserve the freedom of elections and appoint who shall be deemed and adjudged capable of choosing and being chosen, members of the Commons House of Assembly; . . ." [20]

McCrady is the authority for the statement that this meant going back to the old system of holding all elections at Charleston.[21] The dissatisfaction aroused over the veto of the election law and some others led directly to the loss of the colony by the proprietors.

In the meantime the last assembly to meet under the proprietary government passed another election law.[22] The change in qualifications for both electors and representatives was slight. An elector must be possessed of a freehold of fifty acres or must be paying tax on £50 of personal property. One so qualified could vote for representatives for the parish where he actually resided. The property qualification for representatives was also slightly raised to five hundred acres of land and six slaves[23] or houses, buildings, town lots, or other lands in any part of the province to the value of £1,000. This act also increased the membership of the house to thirty-six and reapportioned this number among the parishes.

The first royal governor of South Carolina was Francis Nicholson. He was commissioned in September, 1720,[24] but did not arrive in the province until May, 1721. His instructions[25] were elaborate, comprising ninety-six sections and were the basis of the instructions to succeeding governors. These did not alter the election laws of the province, the only reference to the assembly being

. . . "Members of Assembly to be elected by freeholders only." [26]

[20] Coll. Hist. Soc. of S. C., 1, 166. . . . This referred only to the Act of 1716 which bore this double title.

[21] p. 632.

[22] Statutes at Large (Cooper Ed.), III, 50-55.

[23] The only colony in which this form of property was enumerated as necessary to qualify for public office.

[24] Coll. Hist. Soc. of S. C., II, 150.

[25] *Ibid.*, II, 145-148.

[26] *Ibid.*, II, 145.

The first assembly to meet Nicholson passed an election act (1721).[27] There were two changes in qualifications for electors. The requirement that one must be paying tax on £50 of personal property was changed to

. . . "or hath been taxed in the precedent year twenty shillings or is liable to such a tax the present year."

. . . One so qualified could vote for representatives in the parish,

. . . "where he is actually a resident, or in any other parish or precinct wherein he hath the like qualifications." [28]

The necessary qualifications in order to be elected to the Commons House of Assembly were:

". . . that every person who shall be elected and returned . . . to serve as a member of the Commons House of Assembly, shall be qualified as followeth, viz: He shall be a free born subject of the Kingdom of Great Britain, or of the dominions thereunto belonging, or a foreign person naturalized by act of parliament in Great Britain or Ireland, that hath attained the age of 21 years, and hath been resident in this Province for 12 months . . . and having in this Province, a settled plantation or freehold, in his own right, of at least 500 acres of land, and 10 slaves, or has in his own proper person, and in his own right, to the value of £1000 in houses, buildings, town-lots or other lands in any part of this province." [29]

The next law on the subject was passed in 1745.[30] The preamble warns of the danger of placing the privilege of voting and of being elected to the Commons House of Assembly in the hands of those not "amply qualified". The property qualification of electors was placed at three hundred acres

. . . "on which he pays taxes or hath a freehold in houses, lands, or town lots, or parts thereof, of the value of sixty pounds proclamation money, in Charleston, or any other town in this province, for which he paid tax the present year. . . . ."

[27] Statutes at Large (Cooper Ed.), III, 135-140.

[28] The establishment of royal government was thus marked by the initiation of non-residence voting.

[29] Statutes at Large (Cooper Ed.), III, 137.

[30] *Ibid.*, III, 656-658.

The privilege of voting in whatever parish one had the above qualification was continued. The only change in the qualifications for representatives was an increase in the number of slaves to twenty and a provision that the value of the property possessed must meet the legal requirement

. . . "over and above what he owes."

The last law on the subject of elections was passed in 1759.[31] It made no changes in the qualifications for representatives, but the property qualification for electors was reduced.

In checking the assembly lists for instances of non-residence. representation the period of 1721 to 1776 has been selected. It is not claimed the practice began or ended with these dates. It certainly did not end at 1776, for as we shall see later the constitution of that year was silent on the matter, while the one of 1778 definitely provided for non-residence representation. It is doubtful whether non-residence representation was practiced to any appreciable extent as long as the unit of representation was the county. It doubtless did begin with the establishment of the parish system in 1716. The choice of 1721 as a date from which to begin checking instead of 1716 is due to the fact that parish representation was not firmly and finally established until the advent of royal government.

Examination of the assembly lists for the years mentioned above reveals such a number of cases of non-residence representation, one hundred fourteen, that it is manifestly impossible to enumerate each one in a study of this kind. Below are given twenty-eight cases, however, which will clearly show the prevalence and extent of the practice. These twenty-eight have been selected because each man was prominent in South Carolina affairs, while some of them played an important part in the transition period from province to statehood.

Othneal Beale was a well known Charleston man, being colonel of a regiment of Charleston militia.[32] He represented

[31] Statutes at Large, IV, 98-101.

[32] S. C. Historical and Genealogical Magazine, II, 136.

St. Philip's Parish in 1731 and 1733.[33] In 1739 he was elected to represent St. Thomas and St. Denis but refused to qualify. From 1745 to 1747 he again represented St. Philip,[34] and in 1751 he was elected by Prince William's Parish but refused to qualify.[35]

Edmund Bellinger, of Charleston, represented St. Andrew's Parish from 1731 to 1733.[36] In 1748 he was elected to represent Prince William but refused to qualify. In 1749-50 he was chosen to represent St. Bartholomew, and in 1762 was again elected to represent Prince William,[37] but in both cases he declined to serve.

Daniel Blake, a prominent planter of the province, lived at Newington and in Charleston.[38] Within a space of eight years he represented four different parishes: St. Stephan, 1754-55; Prince William, 1755-56; St. Bartholomew, 1757-58; St. George, Dorchester, 1760-1762.[39]

Miles Brewton, a Charleston merchant and later active in Revolutionary matters,[40] was first elected a representative by St. Andrew in 1763-64, but refused to serve. In 1765 he represented St. Philip's, Charleston; in 1771, St. John, Colleton; and in 1772 and 1773, St. Michael.[41]

Robert Brewton was a Charleston resident and was at one time Powder Receiver of the province.[42] He began his legislative experience as a representative of St. Philip's, Charleston, in 1733. From 1740 to 1742 he represented Christ Church, and in 1745 and 1746 St. Thomas and St. Denis.[43]

Thomas Broughton was a Charleston resident but he had an estate which was probably in St. John's Parish, Berkeley.

[33] Assembly Journal (1728–Sept. 1733), 609; (1733–1734), 6.
[34] *Ibid.*, XII, 135; XXI, 1; XXII, 6.
[35] *Ibid.*, XXVII, 23.
[36] *Ibid.* (1728–Sept. 1744), 609; (1733–1734), 6.
[37] *Ibid.*, XXIII, 120; XXV, 44; XXXV, 6.
[38] S. C. Mag., I, 160.
[39] Assembly Journal, XXX, 60; XXXI, 3; XXXII, 1; XXXIV, 1.
[40] S. C. Mag., I, 143.
[41] Assembly Journal, XXXVI, 41; XXXVII, Part 2, 1; XXXVIII, 460; XXXIX, Index.
[42] S. C. Mag., II, 130, 131.
[43] Assembly Journal (1733–1734), 6; XIII, 235; XIV, 4; XVII, Preface; XXI, 1, 233.

In 1725 he was elected representative by St. John and St. Thomas and St. Denis, but he chose to represent St. John. He later represented the same parish in 1742, 1743, and 1746.[44]

William Bull was one of the most prominent men of the province during the first half of the eighteenth century. He was a graduate of Leyden in medicine. The family estate was Ashley Hall on the Ashley River in St. Andrew's Parish. He was a member of the Commons House of Assembly continuously from 1739 to 1750. During that time he was chosen speaker several times. He represented his home parish from 1739 to January, 1742, and again in 1746-47.[45] The other parishes he was elected to represent at different times were:

St. John, Berkeley, (Sept.).....1742 to 1743.
Prince William.....1745.
Prince William.....1748.
St. Bartholomew.....1748 and 1749.
(Chose to represent the latter in 1748.)
Prince William.....1749.
(This year he chose to represent Prince William.)[46]

Sir John Colleton, whose plantation was Fair Lawn in St. John's Parish, Berkeley,[47] represented that parish from 1762 to 1764, but in 1765 represented St. Helena.[48]

Daniel Crawford, of Charleston, was chosen as representative by several of the outlying parishes before he ever represented a parish of his own city, St. Philip's, in 1757 to 1759. Prior to those dates he had been elected by Prince Frederick in 1742, 1748, 1749 and 1749-50 (refused to qualify for the last two sessions), and by St. James, Santee, in 1746-47.[49]

Thomas Drayton, one of the most prominent men in early South Carolina history, lived most of the time[50] on his plantation on the Ashley River in St. Andrew's Parish. He repre-

[44] Assembly Journal, VII, 83; XVIII, 3; XIX, 1; XXIII, 1.
[45] *Ibid.*, XII, 95; XIII, 245; XIV, 4; XVII, Pref.; XXII, 3.
[46] *Ibid.*, XVIII, 3; XIX, 1; XXI, 1, 37; XXIII, 22, 25, 32; XXIV, 32, 36, 48.
[47] S. C. Mag., I, 337.
[48] Assembly Journal, XXXV, 1; XXXVI, 17; XXXVII, Part 2, 1.
[49] *Ibid.*, XVIII, 3; XXII, 3; XXIII, 1; XXIV, 118; XXV, 27; XXXII, 1; XXXII, Part 2, 0.
[50] It should be borne in mind that most of the wealthy planters of South Carolina had a Charleston residence in addition to their plantation residence or residences.

sented his parish continuously from 1739 to 1745. In 1746 (March) he was chosen by both St. James and St. Paul. He chose to represent St. James. From 1746 to 1748 he represented his home parish, but in 1749 he was elected representative by both it and Prince William but he chose to serve for his home parish. For the session of 1749-50 he was again elected by these two parishes but he again chose to represent the parish where he resided.[51]

Christopher Gadsen, merchant and planter and one of the best educated men in the province, later prominent in the Revolution,[52] represented St. Philip's, Charleston, probably his home parish in seven assemblies between 1757 and 1773,[53] but in 1762 and again in 1765 he represented St. Paul's Parish.[54]

David Graeme, of Charleston,[55] represented Christ Church Parish continuously between 1754 and 1761. At the election for the assembly of 1760-61, however, he was also elected by Prince William but chose to represent Christ Church.[56]

James Graeme was a prominent royal official having been a member of the council and chief justice of the province. In (September) 1742 and again in 1743 he represented St. Philip, Charleston. From 1749 to 1751 he represented St. George, Dorchester.[57]

The place of residence of Edward Harleston can not be positively stated but it was probably in the parish of St. Thomas and St. Denis. He represented that parish from 1745 to 1747. In the election for the assembly of 1746-47 he was also elected by St. John, Berkeley, but he chose to represent St. Thomas and St. Denis. The next year (1748), however, he did represent St. John.[58]

[51] Assembly Journal XII, 95; XIII, 245; XIV, 4; XVII, Pref. XXI, 1, 348, 367, 451; XXII, 3; XXIV, 26, 418; XXV, 1, 147.

[52] Coll. His. Soc. of S. C., IV.

[53] Assembly Journal, XXXII, 1; XXXII, Part 2, 1; XXXIII, Part 2, 3; XXXVII, Part 3, Pref.; XXXVIII, 8; XXXIX, 1; XXXIX, Part 2, Pref.

[54] *Ibid.*, XXXV, Part 2, 1; XXXVII, Part 2, 1.

[55] S. C. Mag., III, 62.

[56] Assembly Journal, XXX, 263; XXXI, 3; XXXII, 27; XXXII, Part 2, 0; XXXIII, Part 2, 7.

[57] *Ibid.*, XVIII, 3; XIX, 1; XXIV, 89; XXV, 1; XXVI, 5.

[58] *Ibid.*, XXI, 1, 226; XXII, 3, 10, 95; XXIII, 1.

David Hext, of Charleston,[59] had such a long and varied career as a representative in the assembly that it will be given in outline form. He represented:

St. James, Goose Creek.....1739.
1740.
1740–41,
(Jan.)...1742.
St. John, Berkeley (Sept.).....1742.
Prince Frederick.....1745.
Prince Frederick (Jan.).....1746.
(Chose to represent Prince Frederick.)
St. Bartholomew (Jan.).....1746.
St. Philip, Charleston.....1746 to
1751.

In 1751-52 he was chosen a representative by St. John, Colleton, but refused to qualify.[60]

Major Elias Horry, of Prince George Parish, was much in demand as a representative, but he seems to have been very averse to serving judging from the number of times he refused to qualify. He was first elected a representative by St. James, Santee, in 1740, but refused to qualify. In 1743 he was chosen by his own parish but again refused to qualify.[61] But in 1745 and 1746 he did represent his home parish. In 1746-47 he was again elected by St. James, Santee, and again refused to qualify, but at the new election which was ordered to fill the vacancy he was again elected and evidently took his seat. In 1748 he was reëlected by St. James, Santee, but refused to qualify. For both the session of 1749 and the one of 1749-50 he was elected by Prince Frederick but both times he refused to serve.[62]

Ralph Izard, of Burton, St. George's Parish,[63] was first elected representative by St. Bartholomew in 1745. In January, 1746, he was elected by both St. Helena and St. George, Dorchester, but refused to qualify for either. In

[59] S. C. Mag., VI, 35.

[60] Assembly Journal XII, 95; XIII, 245; XIV, 4; XVII, Pref.; XVIII, 3; XXI, 1, 85, 90, 101; XXII, 3; XXIII, 1; XXIV, 8; XXV, 1; XXVI, 5; XXVII, 202.

[61] *Ibid.*, XIII, 422; XIX, 49; XXII, 97.

[62] *Ibid.*, XXI, 1, 232; XXII, 3, 272; XXIII, 122, 330; XXIV, 18; XXV, 27.

[63] S. C. Mag., II, 233.

the assembly of 1746-47 he did serve for St. George, Dorchester, and was again elected by that parish in 1748 but refused to serve. From 1756 to 1761 he represented St. George, Dorchester, continuously.[64]

Another member of the Izard family who had a long record as a representative was Walter Izard. He lived at Cedar Grove in St. George Parish. His name sometimes appears in the records of the time as Walter Izard, Jr., or Colonel Walter Izard. His legislative experience began by his representing his parish in 1746. In 1749-50 he represented Prince William, and in 1754-55 and again in 1755-56 St. James, Goose Creek. In the election for the assembly of 1757-58 he was elected both by his own parish and by St. James, Goose Creek. He chose to serve for his own parish.[65]

Captain John Lloyd, who lived in Amelia Township[66] now Calhoun County and who took an active part in the military affairs of the province, represented St. Helena from 1748 to 1751. For the session of 1754-1755 he was chosen by both St. Andrew's Parish and St. John, Colleton. He took his seat as a representative of the latter and continued to serve for it until 1757 when he declined to serve after being elected for that session.[67] In 1768 and again in 1769 he represented St. Michael's Parish.

Gabriel Manigault, a Charleston merchant, and a member of one of the best known families of the province, first served in the assembly for St. Philip's parish in 1733 and again in 1745. In 1748 and from 1751 to 1753 he represented St. Thomas and St. Denis. For the session of 1751-52 he had also been elected by St. Philip's but had chosen to serve for St. Thomas and St. Denis.[68]

Peter Manigault, also a Charleston resident, began his legislative experience by serving for his home parish, St.

[64] Assembly Journal, XXI, 1, 35, 53, 79; XXII, 3; XXIII, 16, 48; XXXI, 5; XXXII, 1; XXXII, Part 2, 0; XXXIII, Part 2, 3.

[65] *Ibid.*, XXI, 79; XXV, 543; XXX, 2; XXXI, 2; XXXII, 1, 5.

[66] S. C. Historical and Genealogical Magazine, III, 98.

[67] Assembly Journal, XXIV, 34; XXV, 1; XXVI, 5; XXX, 17, 20, 31; XXXI, 3; XXXII, 1.

[68] *Ibid.*, XXI, 1; XXIII, 1; XXVII, 5, 8, 33; XXVIII, 5.

Philip's, in 1755-56, but from that date until 1772 he represented St. Thomas and St. Denis almost constantly. During seven years of this time he was the speaker of the house.[69]

Isaac Mazyck, of Charleston, had one of the longest legislative records of any man in the province and certainly the most varied record as a non-resident representative. From 1740 to 1742 he represented his home parish, St. Philip's. In September, 1742, however, he was elected by three parishes, St. Philip's, Prince George, Winyaw, and St. John, Berkeley. He chose to serve for Prince George. In 1745 he represented Prince Frederick. In the session of 1746-1747 he was elected by St. John, Berkeley.[70] While serving for the latter he was elected in January, 1747, as the representative of St. James, Goose Creek. He chose, however, to continue to serve for St. John. In 1748 he was again elected by three parishes, Prince Frederick, St. James, Santee, and St. John, Berkeley. He chose to serve for the first one mentioned. Prince Frederick elected him again in 1749, but he refused to qualify. He did represent that parish the following session but refused to qualify for the session of 1750-51. In the session of 1752-53 he represented St. James, Goose Creek, and in that of 1756-57 St. Thomas and St. Denis. From 1758 to 1771 he represented St. John, Berkeley, almost continuously.[71]

The election of James Michie as a member of the Commons House of Assembly could scarcely have been possible in any other colony. Michie was a royal official, an appointee of the crown, yet he represented St. Philip's in six assemblies, two of which he was speaker. Moreover, for two of these assemblies he was chosen by outlying parishes, St. Helena in 1751 and Prince William in 1754,[72] but in each case he chose to serve for St. Philip's.

Henry Middletown, who lived at Middletown Place,[73]

[69] Assembly Journal, XXXI, 3; XXXII-XXXIX.

[70] *Ibid.*, XIII, 245; XIV, 4; XVII, Preface; XVIII, 3, 15, 17, 25, 40; XX, 1; XXII, 3, 270, 283.

[71] *Ibid.*, XXII, 3, 270, 283; XXIII, 1, 9, 11, 13, 32; XXIV, 18; XXV, 1; XXVI, 5; XXVIII, 5; XXXI, 25; XXXII, 1; XXXIII, Part 2, 3; XXXV, 1; XXXVII, Part 2, 1; XXXVIII, 29, 470.

[72] *Ibid.*, XVIII, 3; XIX, 1; XXVII, 5, 91; XXVIII, 1; XXX, 2, 24.

[73] S. C. Magazine, I, 239.

was perhaps the largest landholder in South Carolina. It is said he had fifty thousand acres distributed among twenty plantations and manned by eight hundred slaves. He never represented any parish but St. George, Dorchester, for which he served in six sessions of the assembly between 1742 and 1756,[74] but in 1749 and again in 1749-50 he was elected to represent St. James, Goose Creek, but each time he refused to qualify.[75]

Another prominent member of the Middletown family was Thomas Middletown. He was a merchant, banker, and planter, and made his home at Charleston and Beaufort.[76] His early years in the assembly were as a representative from St. James, Goose Creek. He represented this parish from 1742 to 1748. From 1751 to 1753 and again in 1755 he represented St. Bartholomew. In 1757 and 1758 he was elected for Prince William and for the session of 1760-61 he was chosen by both Prince William and St. Helena. He chose to represent the former. In 1762 he was elected by both St. Philip and St. Michael, but chose to serve for the latter.[77]

William Moultrie represented St. John, Berkeley, continuously from 1751 to 1759.[78] In 1761 and again in 1762 he represented Prince Frederick, and in 1763 St. Helena. In 1765 he was again chosen to represent Prince Frederick, but did not take his seat as he removed from the province to become Chief Justice of East Florida.[79]

Charles Pinckney, a Charleston lawyer, represented Christ Church Parish from 1753 to 1759. In 1760 he represented St. Philip's; from 1761 to 1765 he was one of the representatives of St. Michael's, while from 1768 to 1773 he represented St. Philip's again.[80]

[74] Assembly Journal, XVIII–XXXI.

[75] *Ibid.*, XXIV, 24; XXV, 194, 213. [76] S. C. Magazine, I, 261.

[77] Assembly Journal, XVIII, 3; XIX, 1; XXI, 1; XXII, 3; XXIII, 1; XXVII, 5; XXVIII, 5; XXXI, 3; XXXII, 1; XXXIV, 1, 3; XXXV, 1, 5.

[78] *Ibid.*, XXVII–XXXII.

[79] *Ibid.*, XXXIV, 236; XXXV, 1; XXXVI, 256; XXXVII, 8.

[80] *Ibid.*, XXX, 4; XXXI, 3; XXXII, 1; XXXII–Part 2, 0; XXXIII, Part 2, 3; XXXIV, 1; XXXV, 1; XXXVII, Part 2, 1; XXXVII, Part 3, Preface; XXXIX, 1; XXXIX, Part 2, Preface.

Andrew Rutledge was another Charleston lawyer who had a long career as representative in the assembly. His term of service covered the years 1733 to 1753.[81] During this whole period he served Christ Church Parish except in the assembly of 1745 and 1746 when he represented St. John, Colleton.[82]

John Rutledge, later famous because of the part he played in the separation of the colonies from England, served Christ Church Parish as a representative continuously from 1760 to 1773.[83] In 1762 he was elected a representative by St. Paul's Parish but he refused to serve.[84]

It will have been noted already that non-residence representation was practiced in South Carolina to a greater extent than in any of her sister colonies. What is the explanation of this? In the first place we have already noticed that whenever a colony or province contained a city which dominated the life of the province that the prominent men, lawyers, and merchants, of that city were freely used by outlying communities as their representatives. Charleston dominated the life of South Carolina as no other city in any one of the thirteen colonies dominated the life of its colony.

Moreover, no other colony had such a system of estates as did South Carolina. It is scarcely putting the matter too strongly to say that practically every family of importance had its town home as well as its plantation home and this town home was, of course, in Charleston.

Then there is one other factor which doubtless influenced the practice. That is the point which Professor McCrady has emphasized, that South Carolina was closer and in more frequent intercourse with England than she was with her sister colonies. This could not help but affect her political practices.

The adoption of a Revolutionary Constitution by a colony or province generally ends our study of that colony. But not so in the case of South Carolina. The constitution of 1776[85] was adopted by a congress on March 26 of that year. Section

[81] Assembly Journal, XIII–XXVIII.
[82] *Ibid.*, XXI, 1, 224.
[83] *Ibid.*, XXXIV–XXXIX.
[84] *Ibid.*, XXXV, 1, 8.
[85] Statutes at Large, I, 131-132.

eleven provided for a biennial assembly which was to consist of the same number of members as the congress which framed the instrument. This number was apportioned among the parishes. The methods of election and the qualifications for electors and representatives were those of the law of 1759.

The above constitution, like most of the Revolutionary ones, was hastily drawn and was not submitted to the people for ratification. So two years later, 1778, another constitution was adopted which was unique from the standpoint of this study in that it definitely provided for non-residence representation. After naming the parishes of the state and enumerating the number of representatives to which each was entitled the qualifications of electors and representatives were stated in the following language:

"The qualification of electors shall be that every free white man, and no other person, who acknowledges the being of a God, and believes in a future state of rewards and punishments, and who has attained to the age of one and twenty years, and hath been resident and an inhabitant in this state for the space of one whole year . . . and hath a freehold at least of fifty acres of land, or a town lot, and hath been legally seized and possessed of the same at least six months . . . or was taxable the present year . . . in a sum equal to the tax on fifty acres of land, . . . shall be deemed a person qualified to vote for . . . a representative, or representatives, to serve as a member or members in the senate and house of representatives, for the parish or district where he actually is a resident, or in any other parish or district in this state where he hath the like freehold . . . No person shall be eligible to sit in the house of representatives unless he be of the Protestant religion, and hath been a resident in this state for three years previous to his election. The qualification of the elected, if residents in the parish or district for which they shall be returned, shall be the same as mentioned in the election act, and construed to mean clear of debt. But no non-resident shall be eligible to a seat in the house of representatives unless he is the owner of a settled estate and freehold in his own right of the value of three thousand and five hundred pounds currency at least, clear of debt, in the parish or district for which he is elected." [86]

[86] Statutes at Large, I, 140-141.

In the above it is interesting to note the very heavy property qualification demanded of one who wished to stand for election as a non-resident in comparison to the property qualification of a resident candidate. While the actual working out of this new law regarding representation is beyond the province of this study it is quite evident that under it the vast majority of representatives chosen by the parishes would be residents. But it is just as evident also that the big plantation owners, who owned land in several parishes and who lived most of the year in Charleston, would continue to be chosen at times as the representatives of parishes where their holdings lay. Such was the law in South Carolina regarding the residence of representatives until Article I, Section 13, of the Constitution of 1865 established a residence qualification.[87]

[87] Non-residence voting had been abolished by law in 1833 (Statutes at Large, I, 199).

GEORGIA

The legislative history of Georgia differs from that of any other province. The charter to Oglethorpe and his associates constituting them

. . . "The Trustees for establishing the colony of Georgia in America,"

gave the company the express right to make laws for the province. An assembly of the freemen or freeholders of the province was not mentioned. Under this instrument the people had no voice in making the laws under which they were governed. In fact, there were practically no laws. Each emergency in the province was met by specific directions from England. In twenty years only three laws were passed by the company; one relating to Indian trade, one to sale and importation of rum and one to slaves.[1]

As is well known, the charter of 1732 limited the authority of the Trustees to twenty-one years.[2] After that period all the powers and privileges of the company in the province were to pass to the king. As we shall see later the trustees even before this period had elapsed were more than willing to be free from the burdens which the province brought them. Reference to an assembly in the charter of 1732 was probably purposely omitted in the hope of avoiding the contests over provincial matters which such a body always caused. Experience of a few years, however, caused some members of the company to see the other side of the question, that is, the advantages of an assembly.

The matter is first mentioned in 1750 in a report to the Common Council of the company by a Committee of Correspondence which had been appointed to make a complete study of conditions in the province and to report with suggestions as to methods of improvement. The report in brief was that in view of the scattered settlements in Georgia and

[1] McCain, 176.

[2] Digest of English Statutes in force in Georgia (Schley Edition), 429-446.

the need of the trustees to be better informed regarding the true state of the province, the committee wished to introduce a set of resolutions. These read in part:

"Resolved.

"That an Assembly be formed and authoris'd to meet in the Town of Savannah in Georgia every Year at the most leisure time; And such time as shall be appointed by the President and Assistants; No such Meeting to continue longer than three Weeks or a month at furthest.

"That Every Town or Village or District in the Province, where ten Families are settled, be empower'd to depute One Person, and where thirty Families are settled to depute two Persons to the said Assembly." [3]

Later clauses of the resolutions stated specifically that

. . . "The Assembly can only propose, debate and represent to the Trustees"

those things which were for the benefit

. . . "not only of each particular Settlement, but of the Province in General".

From this it will be seen that no body with legislative powers was planned.

For membership in this body which was to meet annually there were to be no qualifications the first year. After 1751 each member must have one hundred mulberry trees upon every tract of fifty acres which he possessed. After 1753 no one could be elected a member who had not conformed to the law limiting the number of slaves one could own in proportion to his white servants; who did not have at least one female in his family instructed in the art of reeling silk; and who did not produce fifteen pounds of silk yearly for each fifty acres which he possessed.[4] Four settlements were mentioned by name as being of sufficient importance to be represented. But this list was not mandatory, simply suggestive. The application of the general rule regarding representation was to be left in the hands of the executive officer of the colony,

[3] Ga. Col. Recs., II, 498-499. [4] *Ibid.*, II, 500.

which was the governor, or in his absence, the president of the council.

This proposal after being approved by the Common Council was adopted by the Trustees, on June 26, 1750.[5] Word was at once sent to the province and an assembly met on January 15, 1751. It was composed of sixteen deputies representing eleven villages or districts. The growing demand in the province for a voice in their own affairs is shown by the assembly's request of the privilege of making "by-laws" to be in force in the province until disapproved by the Trustees The request was not granted. This account of the first assembly of Georgia has been given not because it is integrally related to the assemblies which later met under royal authority but because it furnished several important precedents which were evidently taken into consideration when King George decided to grant the province an assembly.

According to the terms of their charter the authority of the Trustees did not expire until June 9, 1753, but by June, 1752, they had determined to surrender the charter. In the interim, while a form of government was being determined upon, authority in the province was exercised by the president and assistants. In March, 1754, the Lords Committee of Trade and Plantations submitted a plan[6] of government to the king which was approved in August. Captain John Reynolds was appointed governor and the government was transferred to him by the president and assistants on October 30, 1754.

In suggesting a plan the Lords Committee gave its opinion that of the different constitutions in America that form of government in those colonies more immediately subject to the crown was "the most proper form of government" for Georgia. A council of twelve, similar in power and constitution to that of the other provinces, was suggested, and a governor

. . . "with powers and directions to call an assembly to pass laws. . . ."

[5] McCain, 191.
[6] Jones, I, 460-461.

As has been said above the suggested plan was adopted. Legislative authority was divided into three parts:[7]

(1) King's Governor,
(2) King's Council,
(3) Commons House of Assembly.

The formation of election districts as well as the length of time each member should serve were evidently left to the governor, an inheritance from the assembly of 1751. All secondary sources definitely state or imply that Governor Reynolds' Instructions contained the qualifications for electors and for members of the Commons House of Assembly.[8]

Shortly after arriving in the province Governor Reynolds issued writs to twelve communities or villages for the election of eighteen representatives. The writs contained the qualifications for both electors and representatives. To vote one had to be twenty-one years of age and be in possession of fifty acres of land in the parish or district where he offered to vote. To be eligible for election as representative one had to own five hundred acres in any part of the province.[9] The above are the familiar royal requirements for suffrage; permitting both non-resident voting and non-resident representation.

The assembly which met in response to the above call, convened at Savannah, January 7, 1755. Although the people of Georgia had had no legislative experience the first assembly took a position, almost from its opening day, which brought it into line with the other provincial assemblies and also brought it into conflict with the governor. This was the assertion of its right to pass on the qualifications of its members. Governor Reynolds said of them:

". . . they expect to have the same privileges as the House of Commons in Great Britain." [10]

On January 29, a Remonstrance and Address to the king was drawn up asking for the privilege of determining the suffrage

[7] Ga. Col. Recs., XIII, 3.

[8] I have failed to find the Instructions. They do not appear in the Georgia Colonial Records, neither is such a manuscript listed by Professor Andrews as being in the Public Record Office. (Annual Report American Historical Association, 1913, 321-406.)

[9] Ga. Col. Recs., XIII, 3.

[10] Doyle, I, 405.

qualifications of the province.[11] Later a memorial was adopted complaining of the qualifications under which the members of the first assembly were elected. The burden of this complaint was that it both disfranchised and made incapable of being elected representative those whose property happened to be located in a town. Stevens says this was remedied but nothing appears in the records regarding it.[12] In fact, the first and only law on the subject of suffrage retained the original requirements.

The law referred to was passed in 1761. Its title was:

. . . "An Act to ascertain the manner and fform of electing Members to represent the Inhabitants of this Province in the Commons House of Assembly".[13]

The preamble stated the manner of electing and the qualifications of electors and members had never been determined by law. The qualifications for voting were: twenty-one years of age; six month's residence in the province; legal possession of fifty acres of land in the "Parish, District, or Village" where one offered his vote. In addition the elector was compelled to make oath that his freehold had not been made over to him on purpose to qualify him for voting.

The qualifications for a representative were:

"That he shall be a free-born subject of Great Britain or of the dominion thereunto belonging or a fforeign person Naturalized professing the Christian Religion and no other and that hath arrived at the Age of Twenty One Years and hath been a Resident in this Province for twelve Months before the date of the said Writ and being legally possessed in his own Right in this Province of a Tract of Land containing at least ffive Hundred Acres." [14]

It will be noted that this law did not change suffrage requirements from those laid down in the writs issued by Governor Reynolds. As this was the only election act passed by the Georgia legislature prior to the Revolution nonresidence representation was legal in the province from the

[11] Ga. Col. Recs., XIII, 42.
[12] Stevens, I, 412.
[13] Ga. Col. Recs., XVIII, 464–472.
[14] Ibid., XVIII, 467.

first assembly until the Constitution of 1777. Investigation shows that it was also practiced to a considerable degree.

Before giving the instances of non-residence representation it has been thought wise to make a statement about the districts represented in the Commons House of Assembly. The parishes have all disappeared as have many of the villages which were represented prior to 1775. The following table contains the places, either parishes or settlements within the parishes, with their positions on a modern map, which were represented during the period under consideration:

Christ Church Parish:

1. Savannah.
2. Acton, rural settlement south of Savannah on Vernon River.
3. Vernonburg, rural settlement south of Savannah on Vernon River.
4. Sea Islands. At mouth of the Savannah.
5. Little Ogeechee. Settlement on river of that name twenty miles south of Savannah.

St. Matthew's Parish:

1. Abercorn. Fifteen miles above Savannah on river.
2. Ebenezer. Three miles south of Abercorn.
3. Goshen. Ten miles south of Ebenezer.

St. George's Parish. Now Burke County.

1. Halifax. Now Waynesborough.

St. Paul's Parish:

1. Augusta.

St. Philip's Parish:

1. Great Ogeechee. Settlements on that river. Included Ossabaw Island.

St. John's Parish. Now Liberty County. Included St. Catherine's Island.

1. Midway.
2. Sunbury.

St. Andrew's Parish. Now McIntosh County. Included Sapelo Island.

1. Darien.

St. James' Parish. St. Simon's Island.

1. Frederica.

St. David's Parish. Northern Part Glynn County.

St. Patrick's Parish. Southern Part Glynn County.

St. Thomas' Parish. Northern Part Camden County.

St. Mary's Parish. Southern part Camden County with islands adjoining.

The instances of non-residence representation which follow have been grouped into two classes:

(a) Those showing representation of different settlements, within the same parish.
(b) Those showing representation of different parishes or of settlements within different parishes.

Philip Box, whose place of residence is uncertain, represented Vernonburg in 1768 and Acton in 1769 and 1771. These were neighboring settlements on the Vernon River.[15]

Jonathan Bryan, a prominent resident of Savannah[16] and later active in Revolutionary matters, represented Little Ogeechee in 1770 and Savannah in 1771 and 1772.[17]

Lewis Johnson, whose place of residence cannot be definitely determined, is an example of both kinds of non-residence representation. In 1755 and 1756 he represented Abercorn and Goshen, respectively.[18] These places were both in St. Matthew's Parish, but in 1761 Johnson represented Savannah, which was in Christ Church Parish.[19]

Noble W. Jones, colonel of the provincial militia, and a prominent resident of Savannah,[20] also furnishes an example of both kinds of non-residence representation. He represented

[15] Ga. Col. Recs., XIV, 590; XV. 6, 303.
[16] Stevens, II, 104; Knight, I, 331.
[17] Ga. Col. Recs., XV, 228, 304, 320.
[18] Ibid., XIII, 7, 81.
[19] *Ibid.*, XIII, 472.
[20] Stevens, II, 104; Knight, II, 228.

Acton in 1755-56; Ebenezer in St. Matthew's Parish in 1760; and Savannah from 1761 to 1769.[21]

Henry Young represented the Islands in 1755-56; Vernonburg in 1763; and the Islands again in 1772.[22]

George Baillie (Bailly), who lived either in Savannah or near there,[23] seems to have been in demand as a representative by distant parishes. In 1764 he was elected by St. Paul's but declined. In 1772 he was elected by both Vernonburg and St. Thomas' Parish. He chose to serve for the latter. He was reelected by St. Thomas' the following year but declined to serve.[24]

Edward Barnard, of Augusta,[25] started his legislative experience by serving in the first assembly from Halifax. After 1760 he continuously represented either Augusta or the parish of St. Paul.[26]

Elisha Butler, of Savannah,[27] was one of the largest landholders of the province. He represented Ogeechee in 1755 and 1757; St. Philip's Parish in 1761, and was elected from Ebenezer in 1764 but declined to serve.[28]

Within four years Samuel Farley, whose place of residence is not certain, represented settlements in three different parishes: Ebenezer in 1769; Great Ogeechee in 1771; and The Islands in 1772.[29]

Sir Patrick Houston was Registrar of Grants and Receiver of Quit Claims. As the only titled man in the province it is not strange that he was elected to the assembly. He lived most of the time in Savannah but had a country seat nine miles south.[30] He was first elected by Vernonburg in 1764. In 1769 he was chosen by St. Andrew's Parish; in 1771 by both the parish and Darien but he declined. The next year the same places reelected him and he served.[34]

[21] Ga. Col. Recs., XIII, 7, 81, 433, 472; XIV, 137, 589; XV, 303, 320, 326.
[22] Ibid., XIII, 7, 81; XIV, 18; XV, 336.
[23] Knight, II, 265.
[24] Ga. Col. Recs., XIV, 87; XV, 327, 364.
[25] Knight, I, 882.
[26] Ga. Col. Recs., XIII, 7, 433, 540; XIV, 158; XV, 303, 320, 515.
[27] Wilson, 43.
[28] Ga. Col. Recs., XIII, 68, 81, 474; XIV, 168.
[29] Ibid., XV, 6, 303, 320.
[30] Knight, I, 388.
[31] Ga. Col. Recs., XIV, 137; XV, 21, 308, 336.

William Jones, whose place of residence cannot be definitely fixed, represented St. John's in 1765; St. John's and Midway in 1768, and St. George's in 1772.[32]

John Mulryne, of Savannah,[33] was an ardent royalist. He served in the assembly for the Islands in 1765, 1768, and 1769. In 1761, however, he served for St. John's Parish, and in 1763 was elected for the villages of Abercorn and Goshen but declined to serve.[34]

Peter Sallers served for three different parishes within a space of five years. St. John's in 1768; St. Patrick's in 1772; and St. Thomas' in 1773.[35]

John Simpson, a resident of Savannah,[36] served for either Frederica or Frederica and St. James' Parish combined from 1765 to 1769. In 1772, however, he represented St. George's.[37]

Alexander Wylly was a prominent man of the province and was speaker of the assembly at one time. His place of residence cannot be definitely located but everything points to Savannah. In 1761 he represented St. George's Parish, and in 1764 and again in 1768 Savannah.[38]

William Young, of Savannah,[39] began his career as a legislator by representing an out-lying district, Ebenezer, in 1768. In October, 1769, he served for his home town but the next month he appears as a representative for St. Andrew's Parish. Later, in 1771 and 1772, he again served for Savannah.[40]

The large number of instances of non-residence representation in Georgia, within a space of twenty years, from the first legislature to the point where the records are not complete and reliable, is striking. And yet it is not surprising when one keeps in mind two or three things.

First, the theory of suffrage and representation in the prov-

[32] Ga. Col. Recs., XIV, 233, 616; XV, 336.
[33] Stevens, II, 106.
[34] Ga. Col. Recs., XIII, 561; XIV, 74, 259, 589; XV, 7.
[35] Ibid., XIV, 590; XV, 320, 404.
[36] Stevens, II, 106.
[37] Ga. Col. Recs., XIV, 227, 494; XV, 18, 336.
[38] Ibid., XIII, 546; XIV, 137, 613.
[39] Stevens, II, 107.
[40] Ga. Col. Recs., XIV, 589; XV, 6, 21, 303, 320.

ince was purely English since the rules governing both questions were made in England and imposed upon the province.

In the second place, settlements were widely scattered and it was no easy task to get to the seat of government. Since non-residence representation was not only allowed, but encouraged, by the high property qualification for a representative, it was often the easier thing to do to elect some man, known in the settlement through his holdings there, but residing nearer the capital of the province.

And thirdly, the development of one town of the province, far beyond any other town, so that it was not only the legal capital but the real center of provincial life, meant that the professional men and wealthy planters living there furnished a fine field from which outlying districts could draw their representatives. The large number of Savannah men who served for other places show how often this was done.

By the constitution of 1777 county representation was introduced. Parishes were renamed or combined into counties. Each county, with exceptions of two or three special cases, was given ten representatives. A residential qualification was established by Section Six which read:

"The representatives shall be chosen out of the residents of each county, who shall have resided at least twelve months in this state, and three months in the county where they shall be elected; except the free-holders of the counties of Glynn and Camden, who are in a state of alarm, and who shall have the liberty of choosing one member each, as specified in the articles of this constitution in any other county, until they have residence sufficient to qualify them for more: And they shall be of the protestant religion, and of the age of twenty-one years, and shall be possessed in their own right of two hundred and fifty acres of land, or some property to the amount of two hundred and fifty pounds." [41]

[41] While a freehold qualification for suffrage was retained, Section Eleven provided that no person had more than one vote and that must be cast where he resided.

CONCLUSION

SINCE a summary of the practice of each state regarding non-residence representation has been given at the close of each chapter not much remains to be said. Perhaps it will be well to outline briefly what was the practice of each state.

New Hampshire: Non-residence representation was practiced only when the towns of the province were represented in the Massachusetts General Court. A residential requirement was included in the Constitution of 1783.

Massachusetts: Practiced extensively from the beginning of the colony until forbidden by law of 1693.

New Plymouth: No non-residence representation.

Rhode Island: Practiced extensively throughout its colonial period. A residential requirement was included in the Constitution of 1783.

New Haven: No non-residence representation.

Connecticut: Practiced extensively throughout the whole colonial period. Not forbidden until the Constitution of 1818.

New York: Practiced throughout its whole provincial period despite the law of 1699, forbidding it. No residential requirement for representatives to-day.

New Jersey: Not practiced prior to 1702. Between 1702 and 1710 several citizens of New York who owned large tracts of land in New Jersey sat in its assembly. A residential qualification established in 1710.

Pennsylvania: No non-residence representation.

Delaware: No non-residence representation.

Maryland: No non-residence representation.

Virginia: No non-residence representation except during the period of reaction, 1676-1692.

North Carolina: No non-residence representation during the proprietary period and for several years thereafter. After 1743 it was practiced until the Constitution of 1777 virtually ended it. Absolutely prohibited by Constitution of 1868.

South Carolina: Practiced extensively throughout colonial period and into period of statehood. Forbidden by Constitution of 1865.

Georgia: Practiced from the assembly 1755 until forbidden by Constitution of 1777.

A careful reading of the list just given will show three contiguous provinces in which there was never any non-residence representation, the proprietory provinces of Pennsylvania, Delaware, and Maryland. In all the other colonies (excepting New Plymouth and New Haven) non-residence representation was practiced at some time in its history.

The above fact suggests that there may have been a difference in the origin and constitution of the legislatures of the different kind of colonies. That was the case.

It is doubtful if very many of those interested in planting colonies in America in the seventeenth century ever foresaw the development of the legislature as an integral and necessary part of the colonial political machinery. While they had the example of Parliament before them it is hardly probable that this suggested to them representative assemblies. Later it is true, however, that legislatures fighting for their rights and privileges often called attention to the privileges of Parliament. So it is within the realm of probability, at least, to say that the colonial legislatures developed as a result of social and political conditions in the colonies. As conditions and circumstances differed from colony to colony so no two legislatures assumed the same form and political practice differed materially from colony to colony.

In the corporate colonies the legislature was simply an enlargement and development of the stockholders meeting of the corporation.

In the proprietary colonies it was an instrument used by the proprietors to make more easy their task both of getting colonists and of keeping them contented after they had them.

In the royal provinces it was a piece of administrative machinery, grudgingly granted by the crown, for the reason

that administration of government would have been practically impossible without it.

The variations in political practice from colony to colony resulted in some surprising similarities between colonies of opposite type and vice-versa. For example, in the two extra-royal colonies of New York and South Carolina we have found the custom of using non-resident representatives, in imitation of the practice of the mother country, was common and long continued. But why should that practice have been followed just as extensively by the corporate colonies, Massachusetts, Rhode Island, and Connecticut? and why should Virginia, which is usually pointed out as an ideal example of royal administration, have consistently opposed the practice? These are questions which only a study of the whole social background of colonial life can answer.

One fact, however, stands out very clearly in connection with the subject of representation in the colonial legislatures. That is that in the beginning, except in three colonies, it was property not people which was represented. In the provinces settled by Penn and Calvert a new idea crept into the meaning of the word "representation" but the older idea asserted itself as soon as the influence of the original proprietors weakened.

The proof of the above is the steady and insistent pressure which was brought to bear by royal authority for the establishment of a property qualification for electors. Royal instructions and commissions iterated and reiterated that election must be by "freeholders".

It was in the distinctly royal colonies that this idea of representation found its greatest expression in practice. In New York and South Carolina the assemblies were dominated by wealthy men, living in the capital city, sometimes merchants and lawyers, but always great land-holders. In the latter, this condition seems to have been accepted as a matter of course, but in the former, where the practice was continually being challenged, we find the arguments by which it was justified. "Could not one vote wherever he owned property?" "If not, was that not taxation without repre-

sentation?" "In fact, did not one (legally) live wherever he had an estate?" In these questions we get at the heart of the prevalent English conception of representation . . . a conception which had been brought to America by practically every English colonist.

But there are unmistakable signs that a feeling soon became manifest that this conception of representation was not adequate to meet the problems of a new country. For we find the legislatures steadily lowering the freehold qualification for voting; gradually bringing the words "free man" and voter nearer and nearer together.

While this point had not been reached by any colony at the end of the colonial period, in most of them the complementary idea was firmly planted that no man, in the colony, regardless of wealth, social position, or attainments could as efficiently serve as a representative in the colonial legislature for a given district as one who lived within that district and understood its people and its problems.

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